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92-20

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1991

BARBARA WINER — PETITIONER

vs.

LAURENCE H. WINER and LINDA R. WINER — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) DID THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DEFRAUD THE PETITIONER OF HER RIGHTFUL ONE-THIRD (1/3) SHARE OF THE INHERITANCE FROM HER FATHER'S TRUST AND ESTATE, THEREBY DENYING HER DUE PROCESS OF LAW, WHEN IT REFUSED TO GRANT HER PETITION FOR FURTHER APPELLATE REVIEW?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN BOSTON, MASSACHUSETTS

Petitioner, Barbara R. Winer, in pro se, respectively prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts entered in the above captioned cause on March 30, 1992.

I.

OPINION BELOW

The Order to deny the Petitioner's "Petition for Further Appellate Review" is attached as Appendix, hereinafter referred to as "App.," A.

TRIAL COURT ORDERS

The Order to deny the Petitioner's Motion to Dismiss the Counterclaims of

Laurence H. Winer is attached as App. B(1)-(3).

The Order to deny without prejudice the Respondents' Motion for the Recovery of Attorneys' Fees is attached as App. C(1)-(3).

The Orders to allow the Respondents' Motion for Summary Judgment are attached as App. D(1)-(3) & E(1),(2).

The Order to dismiss with prejudice the Petitioner's Complaint, and to enter a $38,074.98 judgment in favor of the Respondents on their counterclaims, is attached as App. F(1),(2).

The Order to award the Respondents $38,074.98 is attached as App. G(1),(2).

The Order to allow the Respondents' "Motion to Amend Judgment as a Result of Clerical Error" is attached as App. H(1),(2).

The Order reflecting the corrected judgment on the counterclaims is attached as App. I(1),(2).

APPEALS COURT ORDERS

The Order to deny the "Appellant's Motion to Strike Brief of Appellees" is attached as App. J(1)-(3).

The Order to deny the "Appellees' Motion for Damages for Frivolous Appeal" is attached as App. K(1)-(4).

The "Memorandum and Order Under Rule 1:28," whereby the Court of Appeals reversed judgment for the Respondents on their first counterclaim and affirmed judgment for the Respondents on their second and third counterclaims, is attached as App. L(1)-(13).

The Order denying the "Petition for Rehearing" is attached as App. M.

The letter advising the Petitioner that the Supreme Judicial Court denied her application for a mandate to defer judgment while this case is on appeal to the U.S. Supreme Court is attached as App. N.

II.

JURISDICTION

The Petition for Further Appellate Review was denied on March 30, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), 62 Stat. 929.

III.

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Fourteenth Amendment of the United States Constitution, **Section 1** states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

B. The First Amendment of the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

C. Article VI, Clause 2, of the United States Constitution states:

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

IV.

STATEMENT OF FACTS

On December 12, 1989, Barbara R. Winer the Petitioner in pro se, filed Civil Action ("C.A.") #89-3361 against Respondents Linda and Laurence, her sister and brother, whereby she petitioned the court to remove them from their fiduciary positions as Co-Trustees of their father's Trust, the Linda Realty Trust, for their willful breaches of trust and duties, for their self-dealing, and for their fraudulent conduct toward her whereby they cheated her out of her rightful one-third share of the inheritance in their father's Trust.

In her action, Barbara alleged to facts and circumstances which demonstrate that Linda and Laurence maliciously and willfully misrepresented their intent to distribute to each beneficiary an equal

one-third share of their father's Trust, and an equal one-third share of their father's estate, the David L. Winer Estate[1], so that they might unjustly enrich themselves at her expense and that, as a result of her justifiable reliance on her sister's and brother's good faith, family loyalty and personal integrity, she incurred irreparable monetary damages, damages to her sentimental interests and undue emotional stress.

C.A. #89-3361 alleges the following facts and circumstances:

In July 3, 1989, David L. Winer, the father of Barbara, Linda and Laurence, died leaving a testamentary Trust, a will and an inter vivos Trust document lying

abreast in his office desk drawer. (See App. R, S(1)-(4) & T(1)-(10).)

The will nominates Laurence as executor of said estate, and the Declaration of Trust provides for Laurence to succeed their father as Co-Trustee of said Trust with Co-Trustee Linda.

Laurence, who is also an attorney, reviewed said will and two Trusts. He then advised Barbara and Linda that the legal effect of said documents is that all three children would, and should, receive an equal one-third share of all assets of said estate and Trust according to what they acknowledged were the true intentions of their father. They also agreed that all beneficiaries would share in their parents' memorabilia.

From July, 1982, after their father died, until June of 1985, Barbara

justifiably relied upon Linda's and Laurence's personal and fiduciary integrity to honor their father's intentions and their representations of intent.

Suddenly, in June, 1985, Linda and Laurence refused to answer any of Barbara's inquiries regarding the settlement of the Trust or of the estate.[2]

Barbara then suspected for the first time since their father died that her sister and brother were defrauding her with regard to the proper disposition of her inheritance money.

Linda's and Laurence's protracted lack of communication regarding said Trust and estate induced Barbara to retain the legal services of Attorney Irving L. Greenbaum, of Framingham, Massachusetts, in February, 1986.

Shortly thereafter, in April, 1986, Linda and Laurence offered Barbara the following Trust settlement:

They alleged that they would include Barbara in their father's Trust if she would: (1) sign trust releases exonerating them and the Trust as a prerequisite for receiving any money from said interest (See App. U(1)-(4).); (2) remunerate them for one-third of the money they paid in taxes on the Trust's interest income from 1982-1985, although they failed to pay Barbara her equal one-third share of such; and (3) agree to pay a $3,500.00 trustees' fee to Laurence and (4) pay $3,671.81 to the law firm of Csaplar & Bok for services performed on the Trust, although the only asset of the Trust was their family home, which was sold by a broker within six months of their father's death.

Linda and Laurence remained intransigent about their terms, and failed to negotiate an equitable settlement for Barbara.

Thus, when in 1986 they terminated the Trust, they paid themselves their respective shares, but failed to pay Barbara any money whatsoever.

With regard to the estate: In November, 1986, Laurence sent Attorney Greenbaum a copy of their proposed First Account of said estate without including even one piece of documentation to support or prove the accuracy of their numbers.

As Attorney Greenbaum failed to take any action to protect and defend Barbara's rights and interests, she fired him.

From December, 1986 through mid-September, 1987, Barbara was independent

of legal counsel. During this time the following occurred:

1) In December, 1986, Barbara served Laurence with an Order from the Probate Court requiring him to render his estate accounting.

After Laurence filed his "First Account" Barbara filed objections to such whereby she requested fully documented and detailed estate accountings for each year, 1982-1987.

Her objections were sustained after a June, 1987, Court hearing.

2) Barbara also wrote to the Office of the Bar Counsel in Boston, Massachusetts, complaining about the services of Attorney Greenbaum, and about the behavior of Attorney Laurence H. Winer, as fiduciary of their father's estate and Trust.

Upon receiving a copy of Laurence's January 23, 1987, response to Ms. C. Vecchione, Assistant Bar Counsel, Barbara learned, for the very first time, that her sister and brother maintained that they were not obligated to honor their father's intention to treat her as an equal one-third beneficiary because in their "opinion" their father's handwritten Trust had no legal validity.

She was also informed for the first time that Linda and Laurence claimed they were holding a share of the Trust for her in a non-interest bearing account until she made an "appropriate resolution."

3) Shortly thereafter, in April, 1987, Laurence wrote to Barbara where, for the first time since their father died, he advised her directly that she had no legal right to share in their father's Trust.

He also advised her that the offer to settle the Trust made in April, 1986, had expired, and that she must take prompt action to resolve the Trust or he and Linda would conclude that she did not want her share.

4) In July, 1987, Barbara wrote to Laurence, through his counsel, requesting that Laurence send her what he considered to be her fair share of the Trust even if he deducted the amounts of monies then in dispute.

5) In his September 9, 1987, reply Laurence informed Barbara that if she wanted to pursue a settlement of the Trust she must sign said Trust releases, and she must also consider, in terms of dollar amounts, the "time, effort, and expense" she caused him and Linda to incur by her "...wholly unjustifiable

actions and position in regard to the Trust."

He also informed her that his stated terms described the only basis on which he was willing to proceed, and advised her that if she didn't like it, she could either "do nothing" or she could "attempt to sue."

Laurence closed his letter to Barbara by stating that he spent well over a year dealing with her "nonsense" regarding the Trust and that his patience had run out.

The tone and contents of said September 9, 1987, letter induced Barbara in mid September, 1987, to retain the services of Attorney Jean Carey Davis, at the Danvers, Massachusetts Law Firm of Adriff & Morse, P.C.

Ten months thereafter, in July, 1988, through Attorney Davis, Linda and

Laurence attempted to induce Barbara to believe that they would include her in their father's Trust if: (1) she settled the estate and Trust simultaneously; (2) she signed a form whereby she would be assenting to the "First Account" of the estate as well as to their proposed "Second and Final" account, although in their Second Account, they failed to account for any accrued interest on the balance of their "First Account" and they charged the estate an additional $7,228.08 for the payment of legal fees and services allegedly incurred from April, 1987 to April, 1988, in the settlement of the estate.

Attorney Davis repeatedly advised Barbara to accept her sister's and brother's offer, even though they would not provide formal and documented estate and Trust accountings, or negotiate an

agreement whereby Barbara would share in their parents' memorabilia.

Consequently, Barbara fired Attorney Davis.

Barbara was thereafter forced to proceed in pro se. Accordingly, she undertook independent legal research in order to educate herself as to her legal rights as a beneficiary of her father's Trust and estate, and as to her legal rights in other matters, as well.

Requesting a TRIAL BY JURY, the Petitioner filed C.A. #89-3361 claiming relief for: (1) the actual losses she incurred in her inheritance as a proximate result of said fraud; (2) the compensatory damages she incurred as a proximate result of said fraud; and (3) for the undue emotional stress she

incurred from the Respondent's extreme and outrageous conduct. (See Simon v. Simon, 385 Mass. 91, 95 (1982); Aegis v. Howard Johnson Co., 371 Mass 140, 144, 145 (1976).)

The Petitioner also requested that the Court and jury award her any further relief as deemed just and proper.

The Respondents answered C.A. #89-3361 by generally denying the Petitioner's allegations of their fraud.

They also alleged the following counterclaims against Barbara:

1) "First Counterclaim of Defendant Laurence H. Winer (M.G.L. c. 231 § 6F);

2) "Second Counterclaim of Defendant Laurence H. Winer (Malicious Prosecution); and

3) "Third Counterclaim of Defendant Laurence H. Winer (Abuse of Process."

In their counterclaims, the Respondents generally alleged that their Trust and estate administration were proper.

They also offered general allegations that Barbara had no legal entitlement to their father's Trust and, thereby, their treatment of her was equitable because they offered her,

> "...a fully equal one-third share in the trust."

Thus, they claimed that Barbara filed her lawsuit against them in bad faith because she was attempting to,

> "...obtain a settlement that she has no legal entitlement to that she was nonetheless offered twice and twice refused."[3]

However, the Respondents failed to factually controvert Barbara's allegations that the terms upon which they offered to settle the Trust and the estate were fraudulent as such denied her a fully equal one-third share of the inheritance. They also failed to cite even one legal authority to support their claim that Barbara had no legal entitlement to a share of their father's Trust.

The Petitioner then filed her motion to dismiss the Respondents' counterclaims pursuant to Mass. R. Civ. P. Rule 12(b)(6). (See App. P(3).)

She argued:

The Respondents' First Counterclaim must be dismissed because M.G.L. c. 231, § 6F is not a cognizable cause of action

for which relief may be granted (See App. O, L(1) and L(9).);

The Respondents' Second and Third Counterclaims also state no claim for relief and must be dismissed because the Respondents based their claims on general allegations[4] as herein discussed.

Moreover, the Petitioner noted that in their claim for Malicious Prosecution, the Respondents failed to necessarily allege that C.A. #89-3361 was previously litigated and terminated in their favor (See Cuddy v. Sweeny, 7 Mass. App. Ct., 880, 881 (1979)), and in their claim for Abuse of Process they failed to necessarily allege to even one substantial fact to support their claim that the Petitioner acted in bad faith when she filed her lawsuit in the exercise of her First Amendment right. (See Note "n." 3, herein p.60.)

Moreover, in order to defeat the Respondents' allegations that their estate accounting was proper, the Petitioner exhibited her "Motion to Disqualify Judge Mary McCauley Manzi" (Probate No. 356958), whereby she displayed documentation evidencing that the Respondents **misrepresented the discount rate for nine Treasury Bills on the estate Inventory**. (See App. X(1)-(9) and compare with App. W(1),(2) items #3-11.)

Also displayed, with said motion to disqualify Judge Manzi, were excerpts from the transcript of Laurence's court testimony regarding his management of their father's estate[5]. As examples:

Laurence, who was appointed estate executor in 1982, testified that he filed his estate Inventory in January, 1986, after the December 30, 1985, date when he

closed said estate because, as he stated, he

> "...didn't want to make partial filings and have to go to the trouble of supplementing them later on - So, I preferred to wait until all matters were concluded and do one inventory.[6,7]

Laurence also testified that he failed to file any estate accounting until January, 1987, which was after the date when Barbara served him with a Court Order to account.

Although Laurence acknowledged that Barbara filed objections to his estate accounting, and that her objections were sustained by the Court, when Barbara inquired of him if he thought it reasonable for her to have a yearly, detailed estate accounting he testified,

"In these circumstances, no."

Laurence also testified that the estate incurred tax interest and penalty charges.

However, when Barbara asked him why he failed to file tax extensions to waive those charges, Laurence answered,

> "There was no particular need or reason."

Moreover, during direct examination, Laurence testified that as of January, 1987, when he filed his first account, the balance of the estate was $15,000.00 (fifteen thousand dollars).

However, during cross examination when Barbara asked him what the current estate balance was (as of December, 1988), Laurence testified,

> "It's fourteen thousand and something. It's a little bit less than fifteen thousand."

Barbara then inquired,

> "Is the estate earning any interest?"

Laurence responded,

"No, not since – not since January of 1987."

When Barbara asked Laurence whether or not he should assume responsibility for losses incurred by the estate, Laurence told her,

"No. I think you should."[8]

The Respondents countered said Motion to Dismiss their counterclaims by serving the Petitioner with a Memorandum and Affidavit in support of their counterclaims, whereby they generally alleged that even though they were not obligated to treat the Petitioner as an equal one-third (1/3) beneficiary because they regarded their father's handwritten Trust as having no legal validity, they offered the Petitioner,

> "...a fully equal share in <u>all</u> assets of both the estate and the trust,"

which represents her maximum entitlement

> "...even if she had any legal rights, which she plainly does not."

However, the Respondents failed to cite even one legal authority to support their claim that their father's Trust had no legal validity, or that the Petitioner had no legal rights.

With their Memorandum and Affidavit, the Respondents served the Petitioner with their "Motion for the Recovery of Attorneys' Fees Pursuant to G.L.M. c. 231, § 6F," requesting that the Court award them the legal fees they incurred in responding to the Petitioner's motion.

Barbara opposed Linda's and Laurence's Motion for the recovery of

their attorneys' fees. In so doing, she stated that her interest in their father's Trust cannot be denied because their father always intended that she would receive an equal one-third (1/3) share of his Trust after his death (App. R). She cited Harrison v. Marcus, 396 Mass. 424, 429 (1985) and Groden v. Kelley, 382 Mass. 333, 335 (1981) as examples of the fundamental principle that the intentions of a decedent control the disposition of his property, and she cited Bogert Trusts and Trustees. Ch. 26, § 541 at 154, 155 (1978) as an example of the fundamental principle that a trustee must carry out the intentions of a trust settlor.

Barbara also demonstrated that in the Affidavit the Respondents submitted in support of their counterclaims, the Respondents confessed that they were

using her inheritance money for themselves when, in reference to the fact she filed a lawsuit against them, they stated,

> "This campaign has wasted most of the remaining trust and estate assets."

She also noted that in answer to one of the arguments she presented in her motion to dismiss the Respondents' counterclaims the Respondents stated,

> "Plaintiff's reference in her Motion and Memorandum to Mass. R. Civ. P. Rules 41(b)(2), 8(a)(1) and 8(f) are nonsensical and require no further response."

Accordingly, Barbara filed a Motion for the assessment of the costs she incurred in responding to the Respondents' counterclaims and to their Motion for attorney's fees.

FIRST TRIAL COURT HEARING

On April 3, 1990, the Petitioner/Plaintiff in pro se, and the Respondents/Defendants by counsel appeared in Salem Superior Court before the Honorable J. Harold Flannery, Jr. for argument on the Petitioner's Motion to dismiss the Respondents' counterclaims, her Motion for assessment of her costs, and the Respondents' Motion for the recovery of their attorneys' fees.

Referencing her pleadings, the Petitioner argued that the Court must award her relief because she evidenced that the Respondents defrauded her in her inheritance money.

In response, the Respondents offered general allegations that: (1) the Petitioner has no claim against them for fraud in her father's estate because Judge Manzi allowed their estate

accounting; and (2) the Petitioner has no claim against them for defrauding her in their father's Trust because her two attorneys advised her that she had no interest in such.

At the conclusion of argument, Judge Flannery stated that he would take all matters under advisement.

On April 4, 1990, Judge Flannery entered an Order denying the Petitioner's Motion to dismiss and said counterclaims. He also adjudicated the Respondents' Motion for the recovery of their attorneys' fees appears on App. C (2) & (3).

Judge Flannery issued no memorandum with his Orders.

Moreover, Judge Flannery failed to adjudicate the Petitioner's Motion for the assessment of her costs, and also

failed to respond to the Petitioner's request for his findings.

THE FIRST INSTANCE OF THE FEDERAL QUESTION IN THE TRIAL COURT

Upon notification of Judge Flannery's adjudications, Barbara immediately filed her "Objections to Judgments/Objections to Non-Judgment," whereby she evidenced that Judge Flannery sanctioned the Respondents' fraud toward her in her inheritance money and, thereby, abrogated her rights as guaranteed under the Constitution of Massachusetts Declaration Rights, Pt. 1, Arts. XI and XXIX (App.Q(2) & (3)), and as guaranteed by the **DUE PROCESS CLAUSE** of the Fourteenth Amendment of the U.S. Constitution.

Barbara again raised the Federal question in her "Motion to Vacate Judgments," whereby she maintained that

Judge Flannery's adjudications which deprived her of her liberty and property without **DUE PROCESS OF LAW**, must be deemed void and legally ineffective. (See Bowers v. Board of Appeals of Marshfield, 16 Mass. App. 29, 31, 32; 389 Mass. 1104 (1983); 7, Moore's Federal Practice 2d, § 60.25 (2), at 60-227 (1992); 11, Wright & Miller, Federal Practice and Procedure Ch. 8 § 2862 at 197, 198, 200 (1973); Bass v. Hoagland, 172 F.2d, 205, 209, 210 (5th Cir.)(1949).)

The Federal question was also raised by Barbara in her "Motion to Disqualify Judge J. Harold Flannery, Jr.," whereby she requested that Judge Flannery be removed from her case for denying her **DUE PROCESS OF LAW.**

Thus, the Federal question herein presented for review was before the Court

at a second trial court hearing of C.A. #89-3361.

SECOND TRIAL COURT HEARING

On October 2, 1990, the Petitioner/Plaintiff in pro se, and the Respondents/Defendants, by counsel, appeared in Salem Superior Court before the Honorable John T. Ronan for argument on the following:

1) (Petitioner's) "Motion to Vacate Judgments";

2) (Petitioner's) "Motion to Disqualify Judge J. Harold Flannery, Jr.";

3) (Respondents') "Motion for Summary Judgment" ("MOT.SUM.JUDG.");

4) (Respondents') "Motion to Stay Discovery Pending Disposition of Motion for Summary Judgment" ("MOT.STAY DISCOV.");

5) (Petitioner's) "Motion to Strike Affidavits of Laurence H. Winer and Linda R. Winer in Support of (their) "MOT.SUM.JUDG." and "MOT.STAY DISCOV.";

6) "Plaintiff's Motion for Assessment of Costs" re: responding to said "MOT.SUM.JUDG" AND "MOT.STAY DISCOV.";

7) "Plaintiff's Motion to Strike, 'Objection to Plaintiff's Request for Admissions and Motion to Stay Defendants' Response and any Further Discovery Pending Disposition of Motion for Summary Judgment'" ("OBJ.ADMIS./MOT.STAY DISCOV.");

8) "Plaintiff's Motion for Assessment of Costs" re: responding to said "OBJ.ADMIS./MOT.STAY DISCOV.";

9) (Petitioner's) "Motion to Vacate Default"[9];

10) "Defendants' Motion to Assess Damages for Judgment by Default";

11) (Petitioner's) "Motion for Attachment of Real Estate."

At the start of the hearing, Judge Roman advised the Petitioner that she didn't have to worry about her "Motion to Disqualify Judge J. Harold Flannery, Jr." because said judge was "gone."

During said hearing, the Petitioner argued that the Court must grant her relief because she evidenced that the Respondents defrauded her in the estate and Trust of their father.

In addition, the Petitioner argued that the Respondents' "MOT.SUM.JUDG," is legally insufficient a i non-actionable. In so doing, the Petitioner exhibited the Respondents' June 4, 1990, letter (App. V(1),(2)) to prove the date when they mailed to her their "MOT.SUM.JUDG" with

documents purporting to be their Affidavits in support of such, and argued that said documents can have no legal effect because the Respondents had not signed or notarized said purported Affidavits before they served them to her. (See Mass. R. Civ. P. rules 11(a) and 56(e), App. P(2),(3) & (5).)

Moreover, although the Respondents eventually served the Petitioner with signed and notarized Affidavits dated June 6, 1990, (Laurence) and June 20, 1990 (Linda), such also can have no legal effect because such were served to her without any referenced paper or motion. (See Mass. R. Civ. P. rule 56(e) and Superior Court Rules rule 9A(a)(1), (App. P(5) & (6).)

In answer to Petitioner's argument against their Affidavits, the Respondents

merely stated that their Affidavits were properly submitted.

Moreover, the Respondents argued that the Petitioner could not claim they defrauded her in their father's estate because Judge Manzi allowed their "First Account."

The Respondents then offered into evidence their father's inter vivos Trust, and his handwritten Trust, and claimed that the Petitioner has no entitlement to an equal share of their father's Trust property (App. R & T(1)-(10))[10]

The Respondents offered their opinions that: (1) their father purposely omitted the Petitioner's name as a beneficiary of his Trust; (2) their father wrote his handwritten Trust (which the Respondents termed "note") only to console the Petitioner for her

anticipated hurt feelings at having been omitted; and (3) because their father was an attorney, he knew that his handwritten Trust ("note") had no legal validity.[11]

The Respondents also claimed that said "note" was an attempt by their father to amend his inter vivos Trust. However, they argued that their father could not amend his Trust because such could only be amended upon proof of either fraud, mistake or undue influence – none of which, they claimed, is evidenced by said "note." (See App. R.)[12]

Judge Ronan agreed with the Respondents' opinion that their father didn't want Barbara to share in his Trust.

He also repeatedly commiserated with the fact that the Respondents had to use Barbara's inheritance money to defray the

cost of defending themselves in C.A. #89-3361.

Although Barbara objected to Judge Ronan's advice and stated that she could argue with legal authority her interest in her father's Trust, Judge Ronan would not allow her to present her case.

After she objected and stated that she would appeal his decision, Judge Ronan advised that: (1) she could file her appeal on the 15th floor of the courthouse in Boston where a lot of appeals from his judgments are on file, and (2) he would award the Respondents a judgment against her.

Judge Ronan entered the following adjudications without memorandum and without any discussion of the Federal question presented by the Petitioner in several of her pleadings:

1) On October 2, 1990, he allowed said "MOT.SUM.JUDG." (App. D(1)-(3)).

2) On October 3, 1990, he dismissed the Petitioner's complaint (App. E(1),(2)).

3) On October 10, 1990, he dismissed the Petitioner's complaint with prejudice and awarded the Respondents $38,074.98 on their counterclaims. (App. F(1),(2)).

4) On October 11, 1990, he entered an Order awarding $38,071.98 to the Respondents. (App. G(1),(2)).

5) On November 8, 1990, he allowed the Respondents' "Motion to Amend Judgment as a Result of Clerical Error," and corrected the judgment on the counterclaims. (App. H(1),(2) & I(1),(2))

The Petitioner, once again, raised the Federal question in the State Court

in her "Motion to Disqualify Judge John T. Ronan," whereby she requested that Judge Ronan be disqualified from serving on C.A. #89-3361, or on any related case for sanctioning and rewarding the fraud towards her, and thereby abrogating her **DUE PROCESS OF LAW.**

The Petitioner perfected her appeal in a timely manner.

THE FEDERAL QUESTION
IN THE
MASSACHUSETTS COURT OF APPEALS

The Federal question herein sought for review was presented to Appeal No. 90-P-1372 by the following STATEMENT OF ISSUE:

"1. Did the lower court err when it dismissed with prejudice Civil Action 89-3361 and when it awarded the Appellees Thirty Eight Thousand Seventy Four Dollars and Ninety Eight Cents ($38,074.98) judgment on their counterclaims for,

'frivolous claims under G.L.M. c.231, § 6F, malicious prosecution and abuse of process?'

a. Did the Appellees defraud the Appellant in the estate and Trust of her father, the David L. Winer Estate and the Linda Realty Trust?

b. Did the lower court deny the Appellant **DUE PROCESS OF LAW**?"

In her appeal Barbara presented evidence that her sister and brother defrauded her in her inheritance money, as herein discussed.

The Petitioner also maintained that **she is entitled to her fair and rightful share of her beloved father's Trust on every ground including familial, moral, ethical, logical, reasonable, proper, fair and just.**

She stated that it is unequivocal and morally certain that their father had always **intended** that she would be a beneficiary of his Trust after his death

– an **intention** that he expressed decisively, and to a moral certainty in his handwritten Trust where he explained the latent ambiguity in his inter vivos Trust of why the Petitioner's name was not mentioned in his original Trust document, and clearly expressed what were his true **intentions** and sentiments. (App. R)

She also stated that as an attorney experienced in probate law, it can safely be presumed their father knew that his handwritten Trust would be binding as a term of his Trust[13], and that any Court of Law would also recognize that the sentiments and **intentions** he expressed in his handwritten Trust, manifest his true **intentions** and sentiments.

Moreover, she argued that their father's handwritten Trust could be offered to explain his purpose when he

made his bequests to Laurence. (Taylor v. Albree, 309 Mass. 248, 253, 254 (1941))

Also, she referenced her motion to strike the Respondents'

> "Objection to Plaintiff's Request for Admissions and Motion to Stay Defendants' Response and any Further Discovery Rending Disposition of Motion for Summary Judgment ("OBJ.ADMIS/MOT.STAY DISCOV."),"

whereby she argued that the Respondents' answer to her Request for Admissions is so insufficient, in both form and substance, as to fall within the meaning of a failure to answer pursuant to Mass. R. Civ. P. rule 37(a)(3). Accordingly, all her requests are thereby admitted, and her action is sustained. (See Mass. R. Civ. P. rule 36(a), App. P(4),(5).)

Linda and Laurence filed their "Brief of Appellees," their "Appellees' Motion for Damages for Frivolous Appeal," and their Appellees' Motion for Summary Affirmance."

In response, Barbara filed her "Appellant's Motion to Strike Brief of Appellees" and Oppositions to the Respondents' Motions for damages and summary affirmance.

On January 30, 1991, the "Appellant's Motion to Strike Brief of Appellees" was denied. (App. J(1)-(3))

On February 13, 1992, the "Appellees' Motion for Damages for Frivolous Appeal" was denied by the Appellate Court Panel ("Panel") assigned to this case. (App. K(1)-(4))

Additionally, on February 13, 1992, the Panel issued its "Memorandum and Order Under Rule 1:28" ("MEM. and ORDER")

whereby it reversed the judgment for the Respondents on their first counterclaim, and affirmed the judgment for the Respondents on their second and third counterclaims for malicious prosecution and abuse of process. (See App. L(1)-(13).)

In said MEM. and ORDER the Panel failed to direct any part of their discussion to the Federal question presented by the STATEMENT OF ISSUE in Appeal No. 90-P-1372. (See herein, pp. 41, 42 and App. L(1)-(13).)

On February 26, 1992, Barbara filed her Mass. R. App. P. rule 27 Petition for Rehearing.

On March 24, 1992, the Panel denied said Petition. (App. M)

THE FEDERAL QUESTION IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS[14]

On March 6, 1992, the Petitioner filed her Mass. R. App. P. rule 27.1 Petition for Further Appellate Review ("PET.F.A.R.")

In her "PET.F.A.R.," the Petitioner presented the Federal question by evidencing that the Panel sanctioned the fraud of the Respondents and of other "officers of the court" toward her, and in so doing, abrogated her rights guaranteed under the Constitution of Massachusetts, Declaration of Rights, Pt. 1 Arts. I, VII, XI, XV and XXIX. (See App. Q(1)-(4), and under the First and Fourteenth Amendments of the U.S. Constitution.)

The Petitioner maintained that the Panel's abrogation of her constitutional rights is demonstrated by the fact that

it issued an incomplete and evasive "MEM. and ORDER," whereby it failed to direct any part of its discussion, whatsoever, to the fact that she presented uncontroverted facts and unobjected to evidence of the Respondents' fraud. Instead, the Panel argued that her case fails.

In her "PET.F.A.R.," the Petitioner opposed each one of the Panel's arguments:

1) The Panel contended that the Petitioner presented insufficient appellate argument against the Respondents' counterclaims. (App. L(10))

The Petitioner opposed this argument by referencing Mass. R. Civ. P. rule 10(c) and noting that her appeal incorporates by reference several verified pleadings opposing said

counterclaims (See App. P(2).) (See herein pp. 20-25; 26-28.)

2) The Panel also contended that the Petitioner failed to file any affidavit opposing the Respondents' Motion for summary judgment. (App. L(4),(5))

The Petitioner defeated this argument by stating that it is a matter of Court record that she filed her,

> "Affidavit in Support of Motion to Strike Affidavits of Laurence H. Winer and Linda R. Winer in Support of Defendants' Motion for Summary Judgment and Motion to Stay Discovery."

She also noted that her Affidavit, dated June 14, 1990, is attached as Exhibit "A" to her "Appellant's Motion to Strike Brief of Appellees."

3) Referencing the Respondents' "OBJ.ADMIS./MOT.STAY DISCOV.," the Panel argued that the Petitioner cannot sustain

her action pursuant to Mass. R. Civ. P. rule 36(a) because the Respondents filed a timely motion to stay discovery. (App. L(7),(8))

The Petitioner opposed this argument by stating that the issue here is not the timeliness of the Respondents' motion but the sufficiency of such. (See herein, p. 44.)

4) Moreover, the Panel argued that they don't consider her Affidavit for Monetary Damages properly verified. (App. L(7))

In opposition, the Petitioner maintained that this issue was not properly before the Court because such had never been raised in the trial court and could not be raised for the first time on appeal. (Corman Realty Ins. v. Hyman Rothstein, 4 Mass. App. Ct. 777 (1976); Albert v. Municipal Court of the

City of Boston, 388 Mass. 491, 493, 494 (1983); Bergeron v. Mansour, 152 F.2d 27, 28, 32 (1945). Moreover, the Petitioner again referenced Mass. R. Civ. P. rule 10(c) (App. P(2)) and evidenced that her complaint is incorporated by reference in several verified pleadings whereby her signature was clearly made under oath.

The Petitioner argued that it is clear the Panel denied her **DUE PROCESS OF LAW**.

The Petitioner concluded her "PET.F.A.R." by stating that the issues presented by her case which are of overwhelming concern to the general public are the issues of:

1) LEGAL ETHICS;

2) JUDICIAL ETHICS; and

3) **THE PROTECTION OF THE INDIVIDUAL AGAINST THE ARBITRARY ACTION OF GOVERNMENT.**

Thus, her "PET.F.A.R." must be allowed in the interests of justice to both the Petitioner and the general public.

On March 30, 1992, her "PET.F.A.R." was denied without Memorandum or any discussion of the Federal question herein presented for review. (App. A)

On about April 6, 1992, the Supreme Judicial Court denied the Petitioner's request for a mandate to defer judgment while her case is on appeal to the U.S. Supreme Court. (App. N)

IV.

REASONS FOR GRANTING THE WRIT

A. **THE PETITIONER INCURRED IRREPARABLE MONETARY DAMAGES, SUSTAINING HARM TO HER SENTIMENTAL INTERESTS, AND UNDUE HARM TO HER HUMAN DIGNITY WHEN THE**

SUPREME JUDICIAL COURT OF MASSACHUSETTS DENIED HER DUE PROCESS OF LAW.

Pursuant to Federal Rules of Evidence 201(**b**)(1),(2), (**d**) and (**f**) (App. P(1)), the Petitioner requests the U.S. Supreme Court to judicially notice as not open to reasonable dispute that the Supreme Judicial Court of Massachusetts abused its governmental authority when, for no legitimate reason[15], **it sanctioned the fraud** toward the Petitioner in her inheritance money, and denied her **DUE PROCESS OF LAW**.

Said arbitrary act has caused the Petitioner to incur damages in the loss of her inheritance money which she estimates to be in excess of $125,000.00.

Said arbitrary act has caused the Petitioner to incur an indeterminable amount of damages at having been denied

the right to present her case for damages before a jury.

Said arbitrary act has also caused the Petitioner to incur sustaining emotional distress, as such denied her the right to share in her parents' memorabilia.

Said arbitrary act treated the Petitioner as an unequal person under the law and harmed her human dignity, irrevocably, as it made her feel as if the Court regarded her, her evidence, her arguments and her ideas as worthless because she represented herself in pro se.

Furthermore, as a result of said arbitrary act, the Petitioner has incurred damages at being precluded from prosecuting her related cases for Legal Malpractice, Fraud and Breach of Statutory Duties, against Attorney Irving

L. Greenbaum (Cambridge Superior Court C.A. #89-7462), and against Attorney Jean Carey Davis and the Law Firm of Adriff & Morse, P.C. (Salem Superior Court C.A. #90-2924). (See G.L. c. 221, § 40 App. O(1),(2).)

Said arbitrary act has also precluded the Petitioner from requesting that the Court issue an Order to the Law Firm of Csaplar & Bok, now merged with the Law Firm of Gaston & Snow, to remunerate her for all monies received from her father's Trust and estate – an amount which she estimates to be in excess of $25,000.00.

B. THE UNITED STATE SUPREME COURT CANNOT SANCTION FRAUD

No State or Federal Court may serve as an accomplice in the willful transgression of Federal laws by which

judges in every state are bound. (U.S. Constitution Art . VI, Cl. 2; Lee v. State of Florida, 392 U.S. 378, 385, 386, 88 S.Ct. 209 (1968))

Accordingly, pursuant to Federal Rules of Civil Procedure rule 60(b)(3)(4) and (6) (App. P(1),(2)), the United States Supreme Court must render void and legally ineffective the unlawful, arbitrary adjudication of the Supreme Judicial Court of Massachusetts whereby the Petitioner was deprived of her liberty and property without DUE PROCESS OF LAW. (See Bass v. Hoagland, Bowers v. Board of Appeals of Marshfield, 11 Wright & Miller Federal Practice and Procedure, and 7 Moore's Federal Practice, (supra.) p. 32 herein.)

C. THIS CASE IS OF GENERAL IMPORTANCE BECAUSE IT PRESENTS AN ISSUE

FUNDAMENTAL TO EVERY AMERICAN – THE PROTECTION OF THE INDIVIDUAL AGAINST ARBITRARY ACTION OF GOVERNMENT.

According to Chief Justice William H. Rehnquist[16], writs of certiorari are granted whenever a judgment from a lower court conflicts with other lower court judgments or with precedents established by the U.S. Supreme Court – and the case is of general importance.

The judgment entered by the Supreme Judicial Court of Massachusetts clearly violates the First and Fourteenth Amendments of the U.S. Constitution.

Although the facts of this case pertain to the Petitioner, this case is of overwhelming importance to all Americans who are concerned with the issues of legal ethics, judicial ethics, and with the fundamental principle which

underlies the United States Constitution, **THE PROTECTION OF THE INDIVIDUAL AGAINST ARBITRARY ACTION OF GOVERNMENT.**

Of no less significance is that this case is important to all Americans who are concerned with the human and moral conflicts presented by this case, as many will be able to identify with some, if not all, of those conflicts.

VI.

CONCLUSION

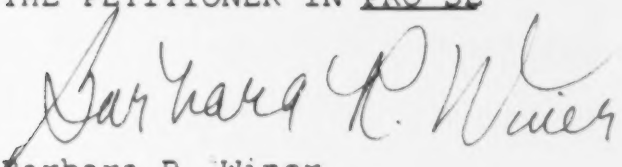
If one American citizen could be so unconscionably discriminated against and defrauded of her birthright – her inheritance money – than every other persons' inheritance rights, as well as their other rights and interests, are in jeopardy.

Wherefore, in the interests of justice to the Petitioner and to the

general American public, the Petitioner respectfully requests that the United States Supreme Court grant her request for a writ of certiorari to be issued to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

THE PETITIONER IN PRO SE



Barbara R. Winer
P.O. Box 122
Tarzana, CA 91357-0122
(818) 377-3245

June 27 1992

ENDNOTES

[1]Although Massachusetts General Laws ("G.L.," "M.G.L." or "G.L.M.") Ch. 215 § 3 provides that the Probate Court has jurisdiction over estates, in C.A. #89-3361, the Petitioner alleges to relevant and material facts which evidence that the Respondents defrauded her in their father's estate as well as in their father's Trust.

[2]Barbara implicates Linda, by consent in the acts of Laurence as the sole executor of their father's estate.

[3]Linda and Laurence made representations totally within their control and authority as Co-Trustees when they offered Barbara an equal share of their father's Trust.

As their conduct induced Barbara to justifiably rely on their integrity in making their statements of intent and caused her to suffer detriments as a result, Linda and Laurence are estopped from denying the consequences of their behavior. (Bergeron v. Mansour, 152 F.2d 27, 30, 31 (1945); Celluci v. Sun Oil Co., 2 Mass. App. Ct. 722, 725, 728-730 (1974), 368 Mass. 811, 812 (1975))

Moreover, G.L. Ch. 231 § 87 provides that in any civil action, the allegations in a pleading shall bind the party making them.

[4]General allegations do not provide material for a favorable judicial determination. It is fundamental that the allegations of the pleading be those of precise fact, and must be set forth clearly, directly and unequivocally. (Kopelman v. U. of Mass., 363 Mass. 463, 465 (1973); Massachusetts Practice, Vol 9, Nolan Ch. 9, § 213, p. 256-258, and § 214 at 258-260 (1975))

[5]On December 19, 1988, Barbara, in pro se, and Laurence with counsel, appeared in Salem Probate Court before the Honorable Mary McCauley Manzi for argument for and against the allowance of Laurence's First (estate) Account. (Probate No. 356958)

On January 24, 1989, Judge Manzi entered an Order allowing said account, after which Barbara filed a Notice of Appeal.

[6]G.L. 195-5 provides that an executor shall file his estate inventory within three months of his fiduciary appointment.

[7]As an attorney, it can safely be presumed that Laurence knew the law, or where to find it.

[8]G.L. Ch. 195, § 17, provides that an executor shall be liable for torts

committed in the administration of his estate if he was personally at fault.

[9]On June 6, 1990, a default was entered against the Petitioner for her alleged failure to answer said counterclaims. (But see herein p. 20-25;26-28.)

[10]If Linda and Laurence truly believe that Barbara had no interest in their father's Trust, they should have informed her of their opinion and their reasons therefor in 1982, and then petitioned the Court for instructions. (See Newhall's Settlement of Estates and Fiduciary Law in Massachusetts, Vol. 3, Ch. 36, § 431, p. 87-89 (1958).)

[11]Opinions not based on fact or first-hand knowledge are improper for judicial determinations (Commonwealth v. Rucker, 358 Mass. 298-300 (1970); Vol. 19, Massachusetts Practice, Hughes, Ch. 6, § 121 at 100, 101; Ch. 18, § 321, at 382, 383 (1961)).

[12]The Respondents base their case on their presumption that their father's handwritten testamentary document is a "note" or "trust amendment." However, they have never defined, in legal terminology, what they mean.

The in pro se Petitioner maintains that, as attorneys, it can be safely

presumed that the Respondents were generally aware:

(1) Their father's handwritten testamentary document contains all the necessary elements which establish the existence of a trust: namely, such evidences a manifestation of an intent to create a fiduciary relationship with respect to property subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another. (Restatement of the Law (Second) Trusts Ch. 1, § 2 at 6 and § 2(h) at 10 (1959); Scott, The Law of Trusts (Fourth), Ch. 1, § 2.3 at 40, 41; § 2.5 at 43; § 2.6 at 48; § 2.7 at 48, 49; § 2.8 at 50; Ch. 2, § 24 at 250 (1987); Bogert, Trusts & Trustees (Second), Ch. 1, § 1, at 1.2 (1984);

(2) A trust may be more than one writing if it relates to the same transaction (Bogert, Trusts & Trustees (supra.) Ch. 3, § 50 at 104, 105 (1984); Vol. 19 Massachusetts Practice, Hughes, (supra.) Ch. 22, § 421 at 541; Bourgeois v. Hurley, 8 Mass. App. Ct. 213, 218 (1979);

(3) A trust requires no particular form of words, it can be established by any writing formal or informal, and it need not be under seal. (Cohen v. Newton Savings Bank, 320 Mass. 90, 93 (1946); Herman v. Eddington, 331 Mass. 310, 314, 315 (1954); Scott on Trusts (supra.), Ch. 2, § 24 at 250;

(4) It is the **intention** of a trust settlor in light of all circumstances, which may be shown by facts occurring after the time of creation of his trust if such facts are admissible into evidence, that determines the terms of the trust. (Restatement of the Law (Second) of Trusts, (supra.), Ch. 1, § 4 at 13 and § 4(d) at 14; Ch. 7 § 164(a) at 341, § 164(c) at 342 and § 164(e) at 342; See herein n. 15; Scott The Law of Trusts (supra.), Ch. 1, § 4 at 53, 54.

Accordingly, their father's hand-written Trust, which has already been admitted into evidence in a judicial proceeding, undubitably proves their father's intent, and is binding.

[13]In her appeal, the Petitioner quoted from the Restatement (Second) Trusts (supra.), Ch. 1, § 4(d) at 14 and Ch. 7, § 164(e) at 342.

[14]That the Petitioner raised the Federal question herein presented for review immediately after she was denied **due process of law**, and thereafter so that each state court necessarily entertained and decided said question, gives the U.S. Supreme Court jurisdiction over this case. See Cumberland Coal Co. v. Board, 284 U.S. 23, 24, 25 (1931).

[15]In addition to those persons on the Supreme Judicial Court who denied her "PET.F.A.R.," at least the following in

the Massachusetts judicial system were aware that the Petitioner was being defrauded in her inheritance, yet no one took any action to protect or defend her legal rights and other interests.

(the) Board of Bar Overseers of the Supreme Judicial Court; (the) Office of the Bar Counsel; (4) (the) Commonwealth of Massachusetts Commission on Judicial Conduct; at least four (4) judges on the Massachusetts Court of Appeals; at least five (5) Superior Court Judges; one Probate Court Judge; and the two attorneys retained by the Petitioner.

Thus, it can be inferred that the Supreme Judicial Court maliciously and unconscionably discriminated against the Petitioner in order to cover up the gross abuses of the judicial system which would have been revealed had the Petitioner's case been heard.

[16]Rehnquist, William H., The Supreme Court: How It Was, How It Is. N.Y.: William Morrow and Company, Inc. (1987), pp. 255-256.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

ORDER

It is hereby Ordered, that the following Application for Further Appellate Review is denied:

FAR-06058

BARBARA R. WINER

vs.

LAURENCE H. WINER & another

Essex Superior Court No. 89-3361

A.C. No. 90-P-1372

By the Court

Frederick J. Quinlan
Assistant Clerk

ENTERED: March 30, 1992

A true copy
Attest: Jean M. Kennett
Clerk of the Supreme
Judicial Court for
the Commonwealth

April 27, 1992

A.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 89-3361

NOTICE OF HEARING

Superior Court Rule 9A a (b)(1). The Court will hear arguments on the within motion at the Essex Superior Court, 34 Federal St., Salem, MA on 4/3/90 at 2 P.M. Flannery, J. Presiding. ALTERNATIVE DATE WILL NOT BE GRANTED.

BARBARA R. WINER,	)	
	)	
Defendant-In-Counterclaim	)	
	)	
vs.	)	DEFENDANT IN
	)	COUNTERCLAIM'S
LAURENCE H. WINER,	)	MOTION TO DISMISS
AS AN INDIVIDUAL	)	COUNTERCLAIMS OF
AND AS TRUSTEE	)	LAURENCE H. WINER,
OF THE LINDA REALTY	)	PLAINTIFF-IN-
TRUST	)	COUNTERCLAIM
	)	
and	)	
	)	
LINDA R. WINER,	)	
AS AN INDIVIDUAL	)	
AND AS TRUSTEE	)	
OF THE LINDA REALTY	)	
TRUST	)	
	)	
Plaintiffs-In-Counterclaim.	)	

Barbara R. Winer, Defendant-In-Counterclaim (hereinafter "Defendant") in pro se, hereby moves this Court to dismiss the First, Second and Third Counterclaims of Laurence H. Winer, Plaintiff-In-Counterclaim (hereinafter "Plaintiff") on the following grounds:

1. The First, Second and Third Counterclaims of the Plaintiff should be dismissed pursuant to Mass. R. Civ. P. 12 (b)(6) for failure to state any claims upon which relief may be granted for the following reasons:

(1) The Plaintiff bases his First Counterclaim upon M.G.L.A. c.231 s. 6F. Said section discusses costs for bad faith claims and defenses and does not state a claim upon which relief may be granted. Therefore, the First Counterclaim should be dismissed.

(2) The Second Counterclaim for Malicious Prosecution fails because the Plaintiff does not allege an essential element of said claim. The Plaintiff fails to allege that Civil Action # 89-3361 is a wrongful civil procedure because it has been previously litigated and decided

Order:*

Denied. J. Harold Flannery, Jr. 4/4/90.

*Word added.

Note: This Order was written on the first page of motion.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 89-3361

BARBARA R. WINER, Plaintiff, v. LAURENCE H. WINER, AS AN INDIVIDUAL AND AS TRUSTEE OF LINDA REALTY TRUST and LINDA R. WINER, AS AN INDIVIDUAL AND AS TRUSTEE OF THE LINDA REALTY TRUST Defendants.	MOTION FOR RECOVERY OF ATTORNEYS FEES PURSUANT TO G.L.M. ch. 231, § 6F

Pursuant to G.L.M. ch. 231, § 6F, defendants Laurence H. Winer and Linda R. Winer move this Court to award them their attorneys fees and costs incurred in defending plaintiff's motion to dismiss

counterclaims. As grounds for this motion, defendants state that the motion is frivolous, unfounded and advanced in bad faith. The lawsuit and motion are the most recent in a series of meritless and unsuccessful court filings, all of which have required defendants to incur further legal fees. As further grounds for this motion defendants refer to the affidavit of Laurence Winer and their memorandum of law

NOTICE OF HEARING

Superior Court Rule 9A a (b)(1). The Court will hear arguments on the within motion at the Essex Superior Court 34 Federal St., Salem, MA on 4/3/90 at 2 P.M. Flannery J. Presiding. ALTERNATIVE DATE WILL NOT BE GRANTED.

Order:*

It may well turn out that the defendants, plaintiffs-in-counterclaim, will be entitled to recover under c.231, § 6F in this case and/or in Essex Probate No.

356958, but the present motion is premature.

Denied without prejudice. J. Harold Flannery, J. 4/4/90

*Word added.

Note: This Order was written on the first page of the motion.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 89-3361

NOTICE OF HEARING

Superior Court Rule 9A (b)(1). The Court will hear arguments on the within motion at the Essex Superior Court, 34 Federal Street, Salem, MA on 10/2/90 at 2 P.M. Ronan, J. Presiding. ALTERNATIVE DATE WILL NOT BE GRANTED.

BARBARA R. WINER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	DEFENDANTS' MOTION
	:	FOR SUMMARY
LAURENCE H. WINER,	:	JUDGMENT
AS AN INDIVIDUAL	:	
AND AS TRUSTEE OF	:	
LINDA REALTY TRUST	:	
and LINDA R. WINER,	:	
AS AN INDIVIDUAL	:	
AND AS TRUSTEE OF	:	
THE LINDA REALTY	:	
TRUST	:	
	:	
Defendants.	:	

Pursuant to Mass. R. Civ. P., Rule 56(b), defendants Laurence H. Winer and

Linda R. Winer hereby move for summary judgment in their favor in the above-captioned action on plaintiff's claims asserted against them. Pursuant to Mass. R. Civ. P., Rule 56(a) and (c), Laurence Winer also hereby moves for summary judgment in his favor as to liability on his Counterclaims and for the entry of a permanent injunction as requested in prayer three of his Counterclaims.

As grounds for this Motion, Laurence and Linda Winer state that the proposed Complaint appears to allege somewhat incoherent claims relating to the so/called Linda Realty Trust (the Trust), an express, irrevocable inter vivos trust created in 1965 by their father David Winer. Laurence and Linda Winer were the co-trustees and beneficiaries of the trust which was

Order:*

October 2, 1990. Roňan J. -
Motion for summary judgment -
allowed.

John P. Greenler
Asst. Clerk

*Word added.

Note: This Order was written on the first page of the motion.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
NO. 89-3361

Barbara R. Winer, Plaintiff(s)

v.

Laurence H. Winer, Individually, and as Trustee of Linda Realty Trust, and Linda R. Winer, Individually and as Trustee of Linda Realty Trust, Defendant(s)

SUMMARY JUDGMENT
(MASS. R. CIV. P. 56)

This action came to be heard before the court, John T. Ronan J. presiding, upon the motion of all defendant(s) for summary judgment pursuant to Mass. R. Civ. P. 56, the parties having been heard, the Court finds that there is no genuine issue as to material fact, and that the defendant(s) are entitled to a judgment as a matter of law

It is hereby ORDERED that:

the complaint of plaintiff Barbara R. Winer be and hereby is dismissed against all defendant(s) with-without costs.

DATE: October 3, 1990

Assistant Clerk John P. Greenler

N.S. B.R.W.
A.P.H.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT
CIVIL ACTION NO. 89-3361

BARBARA R. WINER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
LAURENCE H. WINER, AS AN INDIVIDUAL AND AS TRUSTEE OF THE LINDA REALTY TRUST	)	
	)	
and	)	
	)	
LINDA R. WINER, AS AN INDIVIDUAL AND AS TRUSTEE OF THE LINDA REALTY TRUST	)	
	)	
Defendants.	)	

After hearing and review of the memoranda and affidavits submitted on defendants' motion for summary judgment,

it is HEREBY ORDERED and ADJUDGED as follows:

1. The complaint in this action is dismissed, with prejudice and costs assessed in favor of defendants.

2. Judgment shall enter in favor of the defendants on their counterclaims for frivolous claims under G.L.M., c. 231, § 6F, malicious prosecution and abuse of process.

3. Defendants are entitled to recover damages against Barbara J. Winer in the total amount of $38,074.98.

October 10, 1990

John T. Ronan
So ordered: Associate Justice

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 89-3361

Barbara Winer, Plaintiff(s)

v.

Laurence Winer, Individually, and as Trustee of Linda Realty Trust; and Linda R. Winer, Individually and as Trustee of Linda Realty Trust, Defendant(s)

JUDGMENT
(ON COUNTERCLAIM)

This action came on for (hearing) before the court, John T. Ronan, J. presiding, and the issues have been duly (heard) and findings having been duly rendered,

It is ORDERED and ADJUDGED: the defendants, and plaintiff(s) in Counterclaim, Laurence and Linda Winer recover of the Plaintiff (deft. in

Counterclaim) Barbara J. Winer the sum of $38,074.98.

Dated at Salem, Massachusetts, this 11th date of October, 1990.

John P. Greenler
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
DEPARTMENT
CIVIL ACTION
NO. 89-3361

BARBARA R. WINER, Plaintiff v. LAURENCE H. WINER, as an INDIVIDUAL and as TRUSTEE of THE LINDA REALTY TRUST and LINDA R. WINER, as an INDIVIDUAL and as TRUSTEE of THE LINDA REALTY TRUST Defendants.	MOTION TO AMEND JUDGMENT AS A RESULT OF CLERICAL ERROR Ronan, J. Nov. 8, 1990 Motion allowed. Attest: Donald E. Nutting Asst. Clerk

Pursuant to Rule 60(a) of the Massachusetts Rules of Civil Procedures, plaintiffs-in-counterclaim, Laurence H. Winer and Linda Winer, request that the

judgment entered on October 11, 1990 be amended to correct two clerical errors. Specifically plaintiffs-in-counterclaim request that the judgment be amended to show Laurence Winer as the only plaintiff-in-counterclaim so as to conform to the Answer and Counterclaims and to change the middle initial of plaintiff (defendant-in-counterclaim) from "J" to "R". For the Court's convenience, a copy of the original judgment, with notations as to corrections requested,

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 89-3361

Barbara R. Winer, Plaintiff(s)

v.

Laurence Winer, Individually, and as Trustee of Linda Realty Trust; and Linda R. Winer, Individually and as Trustee of Linda Realty Trust, Defendant(s)

CORRECTED JUDGMENT ON COUNTERCLAIM

This action came on for (hearing) before the court, Ronan, J. presiding, and the issues having been duly (heard) and findings having been duly rendered,

It is ORDERED and ADJUDGED:

(that the plaintiff in counterclaim, Laurence Winer recover of the defendant in counterclaim Barbara R. Winer the sum of $38,074.98.

Dated at Salem, Massachusetts, this 8th day of November, 1990.

Donald E. Nutting
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

APPEALS COURT
NO. 90-P-1372

BARBARA R. WINER

PLAINTIFF-DEFENDANT-IN-COUNTERCLAIM-
APPELLANT

v.

LAURENCE H. WINER AND LINDA R. WINER

DEFENDANTS-PLAINTIFFS-IN-COUNTERCLAIM-
APPELLEES

ON APPEAL FROM THE ESSEX

SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

JAN 22 1991

APPELLANT'S MOTION TO STRIKE
BRIEF OF APPELLEES

Barbara R. Winer, Plaintiff-Defendant-In-Counterclaim-Appellant in Pro Se (hereafter "Appellant"), pursuant to Mass. R. App. P. rule 16 (k), hereby moves this Court to strike the "Brief of Appellees" (hereafter "Brief") for failure to comply with Mass. R. App. P. rules 16 (i), 16 (7)(b) and 16 (a)(3). As grounds for her Motion, the Appellant represents the following:

I. Mass. R. App. P. rule 16 (i) provides in pertinent part that in cases involving cross appeals,

further relief as it deems proper and just.

Respectfully submitted,

THE APPELLANT IN PRO SE

Barbara R. Winer
P.O. Box 122
Tarzana, CA 91357-0122
(818) 377-3245

BBO # 233660
046110

B2 86 437 V

Dated: January 18, 1991.

APPEALS COURT

Denied

SMITH, J.

Date: 1-30-91
ATTEST:

Gerald Quigley
Assistant Clerk

Note: These are pages 1 and 7 of this motion.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 90-P-1372

BARBARA R. WINER,

Plaintiff-Appellant

v.

LAURENCE H. WINER, as an INDIVIDUAL
and as TRUSTEE of the
LINDA REALTY TRUST

and

LINDA R. WINER, as an INDIVIDUAL
and as TRUSTEE of the
LINDA REALTY TRUST,

Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE ESSEX SUPERIOR COURT

K.(1)

APPELLEES' MOTION FOR DAMAGES FOR FRIVOLOUS APPEAL

Pursuant to Mass. Gen. Laws. c. 211A, Sec. 15, and Mass. R. App. Proc., Rule 25, Appellees Laurence H. Winer and Linda R. Winer move this Court to assess double costs, interest and counsel fees against Appellant Barbara R. Winer for this frivolous appeal. The amount of such damages ($4,149.30) is set forth in the Affidavit of Counsel filed herewith.

The ground for this Motion are further set forth in Appellees' Brief on Appeal filed with the Court.

Appeals Court
The within is referred to the panel assigned to decide the appeal.
By the Court.

1/14/91

Attest:

Ashley Brown Ahearn
Asst. Clerk

LAURENCE H. WINER AND
LINDA R. WINER

By their attorneys,
GASTON & SNOW

Andrew P. Hier BBO #233660
Jessica Block BBO #046110
One Federal Street
Boston, MA 02110
(617) 426-4600

APPEALS COURT

Denied

Fine, Jacobs & Porada J.

Date: 2/13/92
ATTEST:

Ashley Ahern
Assistant Clerk

CERTIFICATE OF SERVICE

I, Jessica Block, certify and state under the penalties of perjury that I have this day served two copies of the foregoing Appellees' Motion for Damages for Frivolous Appeal, case No. 90-P-1372, by causing copies of same to be mailed, first class and postage prepaid to:

Barbara R. Winer
P.O. Box 122
Tarzana, California 91357-0122

January 11, 1991

Jessica Block
Jessica Block

Note: These are pages 1 and 3 of this motion.

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON,

February 13, 1992

IN THE CASE OF

BARBARA R. WINER

vs.

LAURENCE H. WINER & another

pending in the Superior Court for the County of Essex

ORDERED, that the following entry be made in the docket; viz.,-

The judgment for the defendants on the plaintiff's complaint is affirmed. The judgment of Laurence H. Winer on the first counterclaim is reversed and on the second and third counterclaims is affirmed as to liability but vacated as to the award of damages. The case is remanded to the Superior Court for a determination of

damages on the second and third counterclaims.

BY THE COURT,

_____ Assistant. CLERK.*

February 13, 1992

Note: Signature illegible.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

90-P-1372

BARBARA R. WINER

VS.

LAURENCE H. WINER & another.[1]

MEMORANDUM AND ORDER UNDER RULE 1:28

The plaintiff brought suit in the Superior Court against the defendants, her brother and sister, on the ground that they had fraudulently deprived her of a one-third interest in the income and rest of an inter vivos irrevocable trust created by their father. (A. 13-29) The defendants denied the claim, and defendant Laurence H. Winer filed

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[1]Linda R. Winer. Laurence H. Winer and Linda R. Winer were named individually and as trustees of the Linda Realty Trust.

counterclaims for relief under G. L. c. 231, § 6F, malicious prosecution, and abuse of process against the plaintiff. (A. 109-121) The plaintiff responded to the defendant Laurence H. Winer's counterclaims with a motion to dismiss. (A. 1,5) After the denial of this motion by a Superior Court judge (A. 2), the plaintiff failed to file an answer to the counterclaims of Laurence H. Winer and a default was entered against her on those counterclaims. (A. 2) The defendants then filed a motion for summary judgment (A. 223-226), supported by affidavits (A. 239-275), on the plaintiff's claims, and defendant Laurence H. Winer also moved for summary judgment on his counterclaims against the plaintiff. (A. 223-226) In response to the defendants' motions for summary judgment, the plaintiff moved to

strike the affidavits of the defendants (A. 276-284), but did not file any counter affidavit or other verified material in opposition to the summary judgment motions. (See A. 3-4) After a hearing, a judge of the Superior Court allowed the defendants' motion for summary judgment on the plaintiff's claims and Laurence H. Winer's motion for summary judgment on his counterclaims. (A. 9) Subsequently, the judge dismissed the plaintiff's claims against the defendants (A. 8) and entered a judgment for defendant Laurence H. Winer in the sum of $38,074.98 on his counterclaims (A. 12). The plaintiff appeals.

We address first the allowance of the defendants' motion for summary judgment on the plaintiff's claims. "[A] party moving for summary judgment in a

case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), [365 Mass. 824 (1974)], unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Here, the defendants through their affidavits demonstrated that they were entitled to judgment in their favor. That showing having been made, the plaintiff was required to respond by setting forth specific facts showing that there is a genuine triable issue. Community Natl. Bank v. Dawes, 369 Mass. 550, 554 (1976).

Kourouvacilis v. General Motors Corp., 410 Mass. at 716. The plaintiff failed to do so. Instead, she relied on her complaint and the failure of the defendants to respond to requests for admissions. (Appellant's b. 13-15) Her complaint was not verified.[2] (A. 13-106) Further, she cannot rely on the defendants' failure to respond to her

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[2]While the docket sheet in the appendix indicates her complaint was verified (A. 1), the complaint in the appendix contains no verification (A. 13-106). We note, however, that a document designated as an "affidavit for monetary damages" which incorporates therein the first ten allegations of her complaint was filed with the complaint. (A. 107-108). Although this document contains a resprensation under the plaintiff's signature that the statements contained therein are true and purports to bear the signature and seal of a California notary public, we do not consider this document an affidavit, for it does not appear that the signature was made under oath or was sworn to under the pains and penalties of perjury.

requests for admissions, because the defendants filed a timely motion to stay all discovery until their motion for summary judgment was heard. (A. 287-289) Mass.R.Civ.P. 26(c), 365 Mass. 775 (1974). The filing of this motion stayed the response time for the filing of any answers to the plaintiff's request for admissions. See St. Regis Paper Co. v. Upgrade Corp., 86 F.R.D. 355, 356 (W.D. Mich. 1980); Smith & Zobel, Rules Practice § 36.7 (1975). The plaintiff's failure to make a responsive showing as provided in Mass.R.Civ.P. 56(c) was fatal. Godbout v. Cousens, 396 Mass. 254, 262-263 (1985). Summary judgment was appropriately entered for the defendants on the plaintiff's complaint.

We turn next to the allowance of summary judgment for Laurence H. Winer on

his counterclaims against the plaintiff. The first counterclaim was a request for relief under G. L. c. 231, § 6F. This statute does not provide a separate cause of action for a claim for attorney fees and other costs and expenses based on claims which a party asserts to be wholly insubstantial, frivolous, and advanced in bad faith. Such a claim can only be made upon a motion in a civil action after a finding, verdict, decision, award, order, or judgment and only against a party who was represented by counsel during most or all of the proceeding. G. L. c. 231, § 6F. Consequently, summary judgment was not properly granted in favor of Laurence H. Winer on his first counterclaim.

With regard to the plaintiff's appeal from the allowance of summary judgment on Laurence H. Winer's

counterclaims for malicious prosecution and abuse of process, we decline to consider it because of insufficient appellate argument. Lolos v. Berlin, 338 Mass. 10, 13-14 (1958). McCone v. New England Tel. & Tel Co., 393 Mass. 231, 236 (1984). See Mass.R.App.P. 16(a)(4), as amended, 367 Mass. 921 (1975). "[T]he rules bind a pro se litigant as they bind other litigants." Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985). In a single sentence containing two footnotes, the plaintiff addresses these claims: "[t]he Appellees' claims for malicious prosecution and abuse of process fail because the Appellees fail to allege to even one substantive fact to support either claim." (Appellant's b. 16-17). This one-sentence paragraph alleging error does not rise to the level of

appellate argument required by Mass.R.A.P. 16(a)(4). Miga v. Holyoke, 398 Mass. 343, 345 n.5 (1986). Commonwealth v. Salcedo, 405 Mass. 346, 351 (1989).

Even if we were to consider the plaintiff's appeal from the allowance of summary judgment in favor of Laurence H. Winer on his counterclaims for malicious prosecution and abuse of process, we would conclude that summary judgment was appropriately granted, because once again the plaintiff failed to file a counter affidavit or, as otherwise provided in Rule 56, to demonstrate that there was a genuine triable issue on these claims. Godbout v. Cousens, 396 Mass. at 261-263.

While we conclude that in these circumstances summary judgment on liability for malicious prosecution and

abuse of process should be affirmed, we believe that the judgment on Laurence H. Winer's counterclaims must be reversed and vacated because the judge's award of damages included, as part of one lump sum amount, an award under G. L.c. 231, § 6F. We therefore remand the case to the Superior Court to determine damages under the second and third counterclaims against the plaintiff in favor of Laurence H. Winer.

The judgment for the defendants on the plaintiff's complaint is affirmed. The judgment for Laurence H. Winer on the first counterclaim is reversed and on the second and third counterclaims is affirmed as to liability but vacated as to the award of damages. The case is remanded to the Superior Court for a

determination of damages on the second and third counterclaims.

By the Court (Fine, Jacobs, & Porada, JJ.)

_____ *

Assistant Clerk

Entered: February 13, 1992

Note: Signature illegible.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

90-P-1372

BARBARA R. WINER

vs.

LAURENCE H. WINER & another

ORDER

The petition for rehearing filed by the appellant having been considered, it is ordered that the said petition be and it hereby is denied.

By the Court (Fine, Jacobs and Porada, J.J.)

Gilbert Lima, Jr.
Assistant Clerk

Entered: March 24, 1992

M.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

Room 1412 Courthouse

Boston, Massachusetts 02108

617: 725-8055

April 6, 1992

Ms. Barbara R. Winer
P.O. Box 122
Tarzana, CA 91357-0122

Dear Ms. Winer:

In response to your letter of April 3, 1992, the Order denying your application has already been forwarded to the trial court clerk's office where your case originated.

You may make the same request of that court.

I return your papers to you.

Very truly yours,

Jean M. Kennett, Clerk

N.

MASSACHUSETTS GENERAL LAWS

1) **Massachusetts General Laws c. 231 § 6F** provides in pertinent part:

Costs, expenses and interest for insubstantial, frivolous or bad faith claims or defenses

Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment **has been made** by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, **after a hearing**, **as a separate and distinct fining**, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall not include in such a finding the specific facts and reasons on which the finding is based. (emphasis)

2) **Massachusetts General Laws c. 221 § 40** states:

Removal.

Removal; grounds; expenses. An attorney may be removed by the supreme

judicial or superior court for deceit, malpractice or other gross misconduct, **and shall also be liable in damages to the person injured thereby**, and to such other punishment as may be provided by law. Wherever a petition is filed for the removal of an attorney, the proceedings thereafter shall be conducted by an attorney to be designated by the court. The expenses of the inquiry and proceedings in either court shall be paid as in criminal prosecutions in the superior court. (emphasis)

FEDERAL RULES

Federal Rules of Evidence.

Rule 201 (b) (1)(2), d and (f) Judicial Notice of Adjudicative Facts provide:

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned.

(d) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(f) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

Federal Rules of Civil Procedure.

Rule 60 (b) (3) (4) and (6) Relief from Judgment or Order provide:

(b) **Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such

terms as are just, the court may relieve a party of a party's legal representation from a final judgment, order, or proceeding for the following reasons... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or... (6) any other reason justifying relief from the operation of the judgment.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 10. FORM OF PLEADINGS

Mass. R. Civ. P. Rule 10 (c) provides:

(c) **Adoption by Reference. Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

RULE 11. APPEARANCES AND PLEADINGS

Mass. R. Civ. P. Rule 11 (a) provides in pertinent part:

(a) **Signing.** Every pleading of a party represented by an attorney shall be

signed in his individual name by at least one attorney who is admitted to practice in this Commonwealth... A party who is not represented by an attorney shall sign his pleadings and state his address and telephone number... If a pleading is not signed, or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

RULE 12. DEFENSES AND OBJECTIONS

Mass. R. Civ. P. Rule 12 (b)(6) provides:

(b) How presented. Every defense, in law or fact to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion;

(6) Failure to state a claim upon which relief can be granted.

RULE 36. REQUESTS FOR ADMISSION

Mass. R. Civ. P. Rule 36 (a) provides in pertinent part:

(a) **Request for Admission.** Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after the service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission either (1) a written statement signed by the party under the penalties of perjury specifically (i) denying the matter or (ii) setting forth in detail why the answering party cannot truthfully admit or deny the matter, or (2) a written objection addressed to the matter, signed by the party or his attorney,... if objection is made, the reasons therefor shall be stated. A denial shall fairly meet the substance of the requested admission... Each admission, denial, objection or statement shall be proceeded by the request to which it responds.

RULE 39. FAILURE TO MAKE DISCOVERY: SANCTIONS

Mass. R. Civ. P. Rule 37 (a)(3) provides:

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

RULE 56. SUMMARY JUDGMENT

Mass. R. Civ. P. Rule 56 provides in pertinent part:

(e) **Form of Affidavit: Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. **Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.**

SUPERIOR COURT RULES

RULE 9A. MOTIONS AND INTERLOCUTORY MATTERS

Superior Court Rules Rule 9A (a)(1) provides:

(a) **Submissions of Motions and Oppositions Thereto.**

(1) *Submission of Motion.* The moving party shall serve with the motion

a statement of reasons, including supporting authorities, why the motion should be granted. A statement of reasons may be included in the motion itself or may be contained in a separate document. **Affidavits and other documents setting forth or evidencing facts on which the motion is based shall be served with the motion.** (emphasis)

1) **The Constitution of Massachusetts, Declaration of Rights, Pt. 1, Art. 1 provides:**

Equality and Natural Rights of All People

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reconed the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

2) **The Constitution of Massachusetts, Declaration of Rights, Pt. 1, Art. VII provides:**

Objects of Government; Right of People to Institute and Change It.

Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore, the people alone have an incontestable, unalienable,

and indefensible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

3) **The Constitution of Massachusetts, Declaration of Rights, Pt. 1, Art. XI provides:**

Remedies, by Recourse to the Law to be Free, Complete and Prompt.

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

4) **The Constitution of Massachusetts, Declaration of Rights, Pt. 1 Art. XV provides:**

Right to Trial by Jury Sacred, Except, etc.

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in cases arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

5) **The Constitution of Massachusetts, Declaration of Rights, Pt. 1, Art. XXIX provides:**

Judges of the Supreme Judicial Court:

It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is therefore, not only the best policy, but for the security of the rights of the people and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they

should have honorable salaries ascertained and established by standing laws.

DAVID L. WINER
Attorney at Law
156 Broad Street
Lynn, Mass. 01901

Telephone (617) 593-8370

April 20, 1979

Dear children

I inadvertently left out Barbara's name as beneficiary in Linda Realty Trust. I want her to share equally with Linda and Laurie. I love you all equally. So, except for the law books and practice and automobile - all equal.

However, since Laurie is getting more in assets, in the division of personal property Linda and Barbara should each get more than one third. I am sure Laurie will be fair as I would want him to be.

Dad

R.

W I L L

of

DAVID L. WINER

I, David L. Winer of Lynn, Massachusetts, hereby make my will, revoking all previous wills and codicils.

FIRST: To my son, Laurence H. Winer, I give and bequeath my automobile and my law books and law practice, if he survives me.

SECOND: All the rest of my tangible personal property I give and bequeath to those of my three children who survive me in equal shares. I empower my executor to divide such property between my three children by any method which he deems advisable.

THIRD: All jointly owned property, bank deposits, and securities, I give and bequeath to the surviving joint owner.

FOURTH: All the rest and residue of my property real and personal wherever situated, I give and bequeath to my three children in equal shares.

FIFTH: As executor without surety I nominate my son, Laurence H. Winer.

SIXTH: My executor shall have the power, in addition to all common law and statutory authority, and without court order:

(a) To sell any property real or personal at public or private sale;

(b) To settle any claim in favor of or against my estate;

(c) To distribute any property in kind;

(d) To invest in any property suitable for trust investments or to retain any property owned by me at my death.

SEVENTH: All estate, inheritance, gift, and similar taxes, and any interest and penalties thereon, imposed on the transfer of property included in my taxable estate whether passing under this will or otherwise shall be paid out of the residue as an expense of administration.

IN WITNESS WHEREOF, I sign, publish, and declare this instrument in the presence of the three persons witnessing it at my request whose signatures will appear below, this 30th day of August, in the year one thousand nine hundred and seventy-four at Lynn, Massachusetts.

David L. Winer
DAVID L. WINER

Signed, published, and declared by the said DAVID L. WINER as his last will and testament in our presence, and we at his

request and in his presence and in the presence of each other sign our names as witnesses thereto at the same time and place.

_____ of _____

_____ of _____

_____ of _____

Note: Will signed but names illegible.

DECLARATION OF TRUST

Know all men by these presents that we, DAVID L. WINER and LINDA R. WINER all of Lynn, Essex County, Massachusetts hereby acknowledge, agree and declare for ourselves, our heirs successors, and assigns that we are about to take title to certain lands and property in the City of Lynn, Essex County, Massachusetts, and contemplate that we may hereafter take title to other property, real and personal, in said Commonwealth of Massachusetts, or elsewhere, as trustees. All of such properties are to be held in trust upon certain terms and conditions and for certain purposes herein set forth.

1. The trust is designated as the Linda Realty Trust.

2. The trust at all times shall be administered by two trustees as hereinafter provided. The trustees are DAVID L. WINER and LINDA R. WINER. Upon the decease of either of the said trustees the said LAURENCE H. WINER herein named shall be substituted as the new trustee and shall succeed to the title of all properties of said trust, real or personal, and he shall thereupon become subject to all of the obligations and entitled to all of the benefits as such trustee.

3. Said trustees shall hold all the funds and property, hereinafter called the trust fund, now or hereafter held by or paid to or transferred or conveyed to them on their successor as trustees hereunder in trust for the

purposes, with the powers and subject to the limitations hereafter declared.

4. To pay the net income not less than annually in shares of one-third to each, one of such thirds to DAVID L. WINER, one-third to LINDA R. WINER herein named, one-third to LAURENCE H. WINER herein named, all two last named being the children of the said DAVID L. WINER. Upon the decease of DAVID L. WINER the income shall thereafter be paid to their children in equal parts and, in the event of the death of any of the said children, to the issue of the said children by right of representation until the last of said children shall have died, and thereafter to the grandchildren of the said DAVID L. WINER.

5. The trustees, in addition to, and not in limitation of all common law

and statutory shall have the power with reference to both real and personal property in the trust fund or any part thereof to mortgage, lease with or without option, to purchase, to sell in whole or in part at public or private sale without the approval of any court and without liability upon any person dealing with the trustees to see to the application of anymoney or other property delivered to them; to retain the proceeds of any sale or mortgage as part of the principal of the trust estate and invest and reinvest the same in such manner and properties as said trustee may determine, or pay same over in whole or in part to said beneficiaries; to determine what shall be charged or credited to income and what to principal; to decide whether or not to make deductions from income for

depreciation, obsolescence, amortization or waste, and if so in what amounts; to pay, compromise, or contact any claim or other matter directly or indirectly affecting this fund.

6. In every written contract made by the trustee or in the name of the trust reference shall be made to this instrument and anyone contracting with the trustee shall look to the funds and property of the trust for the payment of any debt, note, mortgage, judgment or decree or of any money that may otherwise become due and payable by reason of the failure on the part of said trustee to perform such contract in whole or in part, or for any other cause, and neither the trustee nor the beneficiaries shall in any event be personally liable therefor.

7. The trustee hereunder shall be entitled to indemnity from the trust property on account of any matter or thing done by him in relation thereto except on account of a liability which arises from his wilful misconduct but such right to indemnity shall not accrue until a judgment or decree has been rendered against such trustee establishing such liability, and in no event shall any beneficiary be obligated individually to indemnify the trustee on account of any personal liability aforesaid.

8. The interests of the beneficiaries hereunder, either income or principal, shall not be subject to assignment, anticipation, alienation, pledge, hypothecation or transfer except as may be herein otherwise provided nor

shall such interests be subject to any attachment or levy, nor execution, nor other process either in law or in equity, nor taken under any Federal Bankruptcy, nor in any State insolvency proceedings.

9. After the death of the said DAVID L. WINER and if also all of said children shall have reached the age of twenty-one, the then trustees may, in their discretion, distribute the trust fund among the persons then entitled to share the net income in the same proportions in which they are then entitled to share such income, and if, at the death of the said DAVID L. WINER or thereafter, but before final distribution, there shall be a failure of issue of the said DAVID L. WINER or of his children, then to pay over the principal to those persons who would take

the property of the said DAVID L. WINER under the laws of the Commonwealth of Massachusetts had he then died intestate.

10. This trust shall terminate and be at an end upon the expiration of twenty years after the death of said DAVID L. WINER and thereupon the trust fund shall be distributed to the persons then entitled to share the net income in same proportions in which they are then entitled to share such income, or if at the death of the said DAVID L. WINER or thereafter but before final distribution there shall be a failure of issue of the said DAVID L. WINER or his children then to pay over the principal to those persons who will take the property of said DAVID L. WINER under the laws of the Commonwealth of Massachusetts had he then died intestate.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals and the said DAVID L. WINER and LINDA R. WINER, in token of their acceptance of the trust hereby created have set their hands and seals this 30th day of October, 1965.

David L. Winer
DAVID L. WINER

Linda R. Winer
LINDA R. WINER

COMMONWEALTH OF MASSACHUSETTS

Essex, ss October 30, 1965, Lynn, Mass. personally appeared before me the above named DAVID L. WINER and LINDA R. WINER and acknowledged the foregoing instrument to be their free act and deed.

Before me,

Samuel Sidman
SAMUEL SIDMAN-Notary Public

my commission expires March 31, 19

Essex ss. Recorded Nov. 7, 1966. 47 m. past 11 A. M. #13.

GENERAL RELEASE

KNOW ALL MEN BY THESE PRESENTS:

That Barbara R. Winer hereby acknowledges that she has been furnished an accounting of the administration of the Linda Realty Trust, that she has examined said accounting furnished by Laurence H. Winer as trustee, that she is satisfied that it represents a true, complete, and accurate statement of the assets, income and expenditures of said Trust, that she consents to the manner and amounts of the distribution of Trust assets set forth in said accounting, that she has been advised by independent counsel with regard to matters relating to the said Trust including this General Release, and that she freely and willingly executes this General Release. Therefore, for and in consideration of

the sum of One Dollar ($1.00) and other good and valuable consideration to her in hand paid, the receipt of which is hereby acknowleged, Barbara R. Winer has remised, released, and forever discharged, and by these presents does for herself and for her heirs, executors, administrators, and assigns remise, release, and forever discharge (Linda Realty Trust, and each of its predecessors and assigns, and the trustees, employees, agents and representatives thereof, both present and former,)* (Laurence H. Winer/Linda R. Winer, individually and as he/she is Trustee of Linda Realty Trust, and each of his/her heirs, executors, administrators, and assigns,) of and from all, and

---

*Note: There were three Trust Release forms: One for The Linda Realty Trust, and one each for Linda and Laurence.

all manner of action and actions, cause and causes of action, suits, debts, controversies, damages, judgments, executions, claims, and demands whatsoever, in law or in equity, which against the said (Laurence H. Winer/Linda R. Winer he/she ever had, now has, or which he/she or his/her) heirs, executors, administrators or assigns hereinafter can, shall, or may have, whether or not now known, for, upon or by reason of any matter, cause, causes or thing whatsoever from the beginning of the world to the date of these presents, including any claims or causes of action arising from or which might have arisen from, in whole or in part, or relating to in any way, directly or indirectly, the Linda Realty Trust, its management, administration, or termination, or the

investment, use, sale, lease or disbursement of any of its property, funds, or assets, or any of the duties, obligations, acts or omissions of (Laurence H. Winer/Linda R. Winer) individually or as trustees thereof.

IN WITNESS WHEREOF, the said Barbara R. Winer has caused these presents to be signed on this ____ day of _____, 1988.

_____
Barbara R. Winer

Sworn to before me

_____, 198_

_____
Notary Public

My Commission Expires:

(Seal)

Note: Barbara did not sign this.

CSAPLAR & BOK

One Winthrop Square
Boston, Massachusetts

June 4, 1990

Barbara Winer
P.O. Box 122
Tarzana, CA 91357-0122

Re: Barbara R. Winer v. Laurence H. Winer. et al., Civil Action No. 893361

Dear Ms. Winer:

I enclose defendants' Motion for Summary Judgment, Affidavit of Laurence H. Winer, Affidavit of Linda R. Winer, and Memorandum of Law in Support of Summary Judgment. I also enclose defendants' Motion to Stay Discovery.

Pursuant to Rule 9A, you have twenty-one (21) days to serve a response to the motion for summary judgment. You have (10) days to serve a response to the

motion to stay discovery. Please send your responses directly to me so that I may file the original motions and your responses with the court.

Yours sincerely,

Jessica Block

ESTATE OF DAVID L. WINER

INVENTORY

SCHEDULE OF PERSONAL ESTATE IN DETAIL

A. STOCKS AND BONDS

1.	American Telephone & Telegraph Co. 70 shares common Unite value: 50.34375	$ 3,524.00
2.	Exxon Corporation 84 shares common Unit value: 27.03125	2,271.00
3.	U.S. Treasury Bill Issue date: 1/14/82 Maturity Date: 7/15/82 Face amount: $10,000 Bid: 12.10	9,956.00
4.	U.S. Treasury Bill Issue date: 2/4/82 Maturity date: 8/5/82 Face amount: $10,000 Bid: 11.67	9,890
5.	U.S. Treasury Bill Issue date: 3/11/82 Maturity date: 9/9/82 Face amount: $20,000 Bid: 12.32	19,528.00

6. U.S. Treasury Bill
Issue date: 4/1/82
Maturity date: 9/30/82
Face amount: $10,000
Bid 12.59

9,685.00

7. U.S. Treasury Bill
Issue date: 5/13/82
Maturity date: 11/12/82
Face amount: $20,000
Bid: 13.04

19,036.00

8. U.S. Treasury Bill
Issue date: 5/13/82
Maturity date: 11/12/82
Face amount: $20,000
Bid: 13.04

19,036.00

9. U.S. Treasury Bill
Issue date: 5/20/82
Maturity date: 11/18/82
Face amount: $30,000
Bid: 13.04

28,490.00

10. U.S. Treasury Bill
Issue date: 5/27/82
Maturity date: 11/26/82
Face amount: $10,000
Bid: 13.08

9,466.00

11. U.S. Treasury Bill
Issue date: 7/1/82
Maturity date: 12/30/82
Face amount: $10,000
Bid: 12.99

9,455.00

BUR. OF THE PUBLIC DEBT

STATEMENT DATE: 01/27/92

ACCOUNT NUMBER: AMA-2-0026 20 2989-01

011-15895

-2420.257

ISSUE DATE	MATURITY DATE	CUSIP	PAR AVAILABLE AT	AMOUNT	DISCOUNT
01/16/92	07/16/92	912794AM8	026-2U-2989	10,000	647.40

TO BE REINVESTED	TO BE PAID
0	10,000

THIS ACCOUNT IS ELIGIBLE FOR REINVESTMENT INTO 13.26 OR 52 WEEK BILLS

DESIGNATION INFORMATION

DAVID L WINER
156 BROADWAY ST
LYNN MA 01901

3. U.S. Treasury Bill

Discount 647. 40

X (1)

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department E
Washington DC 20239

Phone: (202) 287-4113
Phone (Deaf - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4632, "Request for Transactions in Book-Entry Treasury Bills." All changes for this account must be received at the address above by:

06/16/92

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

BEST AVAILA

FORM PD 4048
DEPT. OF TREASURY
BUR. OF THE PUBLIC DEBT

STATEMENT OF ACCOUNT FOR TREASURY BILLS

THIS STATEMENT IS NOT NEGOTIABLE

STATEMENT DATE:
07/08/82

011-20651

BILL DATE	MATURITY DATE			AMOUNT	DISCOUNT
02/08/82	08/05/82	912794BGB 028-20-2848		10,000	700.00
				10,000	

THIS ACCOUNT IS ONLY ELIGIBLE FOR REINVESTMENT INTO 13 OR 26 WK BILLS. NO 52-WK BILL WILL BE OFFERED ON THIS BILLS MATURITY DATE

DAVID L WINER
156 BROAD ST
~~SPRINGFIELD MA 01105~~
Lynn

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department X
Washington DC 20226

Phone: (202) 287-4113
Phone (Deaf - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book Entry Treasury bills." Exchanges for the account must be received at the address above by

07/08/82

Retain this statement for your tax records. If Treasury bills are held to maturity the discount is considered interest income and must be reported for the tax year in which the bill matures.

4. U. S Treasury Bill

Discount 700. 00

X (2)

BLE COPY

FORM PD 4949
DEPT. OF TREASURY
BUR. OF THE PUBLIC DEBT

STATEMENT OF ACCOUNT FOR TREASURY BILLS

THIS STATEMENT IS NOT NEGOTIABLE

STATEMENT DATE:
03/22/82

AVC-2-[illegible] 3C 2488-31

081-[illegible]
[illegible]983

ISSUE DATE	MATURITY DATE	CUSIP	TREASURY BILL NO.	AMOUNT	DISCOUNT
03/11/82	09/09/82	912794AV3	024-30-2488	20,000	1,219.80

[illegible]	0	20,000

THIS ACCOUNT IS ELIGIBLE FOR REINVESTMENT INTO 13,26 OR 52 WEEK BILLS

INVESTOR INFORMATION

DAVID L WINER
156 BROAD ST
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department X
Washington DC 20226

Phone: (202) 287-4113
Phone (Deaf - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book-Entry Treasury Bills." All changes for this account must be received at the address above by:

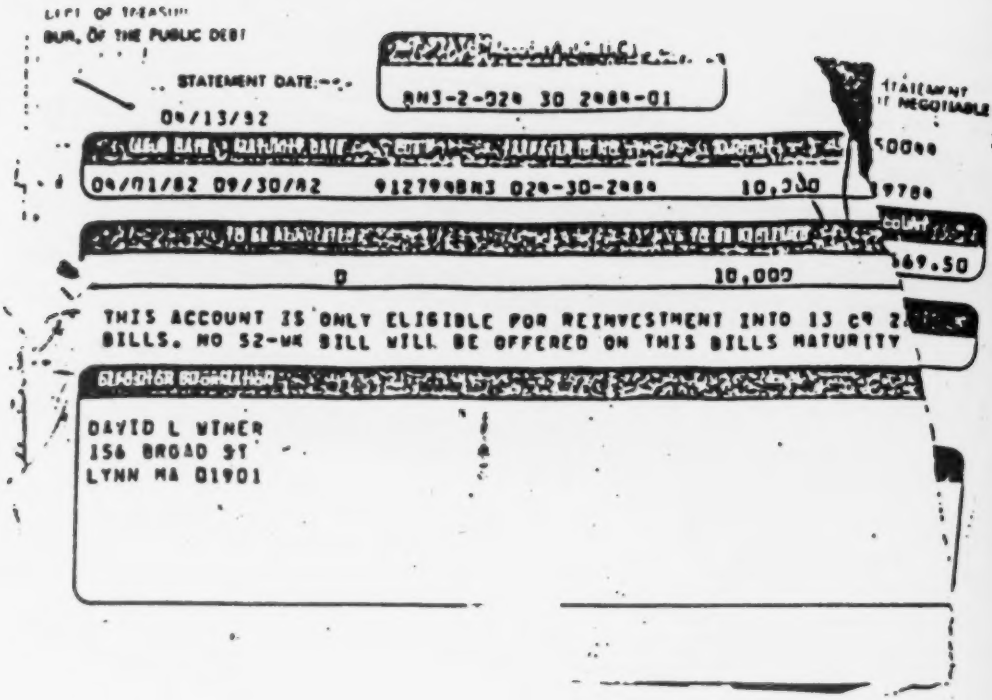
08/11/82

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which it matures.

5. U. S. Treasury Bill

Discount 1,219.80

X. (3)



DEPT OF TREASURY
BUR. OF THE PUBLIC DEBT

STATEMENT DATE:
09/13/82

RN3-2-529 30 2484-01

STATEMENT NOT NEGOTIABLE

ISSUE DATE	MATURITY DATE	CUSIP NO.	DISCOUNT	AMOUNT
09/01/82	09/30/82	9127948N3	029-30-2484	10,000

		AMOUNT
0	10,000	669.50

THIS ACCOUNT IS ONLY ELIGIBLE FOR REINVESTMENT INTO 13 C[illegible]
BILLS. NO 52-WK BILL WILL BE OFFERED ON THIS BILLS MATURITY

DAVID L WINER
156 BROAD ST
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department X
Washington DC 20226

Phone: (202) 287-4113
Phone (Deaf - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book-Entry Treasury Bills." All changes for this account must be received at the address above by:

09/01/82

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

6. U. S. Treasury Bill

Discount 669.50

X (4).

FORM PD 4949
DEPT. OF TREASURY
BUR. OF THE PUBLIC DEBT

STATEMENT OF ACCOUNT FOR TREASURY BILLS

THIS STATEMENT IS NOT NEGOTIABLE

STATEMENT DATE:

ACCOUNT NUMBER

011-57557

ISSUE DATE	MATURITY DATE	CUSIP	TRANSACTION NO.	AMOUNT	DISCOUNT
05/13/82	11/13/82	912398853	038-36-2484	20,000	1,244.00

ID OF MATURING	ID OF NEWLY
0	20,000

THIS ACCOUNT IS ONLY ELIGIBLE FOR REINVESTMENT INTO 13 OR 26 WK BILLS. NO 52-WK BILL WILL BE OFFERED ON THIS BILLS MATURITY DATE

DAVID L WINER
156 BROAD ST
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

...u of the Public Debt
...treet X
Washington DC 20226

Phone (202) 287-4113
Phone (Deaf - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book-Entry Treasury Bills." All changes for this account must be received at the address above by

10/19/82

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

7. U. S. Treasury Bill

Discount 1,244.00

X (5).

FORM PD 4948
DEPT. OF TREASURY
BUR. OF THE PUBLIC DEBT

STATEMENT OF ACCOUNT FOR TREASURY BILLS

THIS STATEMENT IS NOT NEGOTIABLE

STATEMENT DATE: 12/24/92

011-57393

ISSUE DATE: 11/13/92 MATURITY DATE: 11/13/92 AMOUNT: 30,000

THIS ACCOUNT IS ONLY ELIGIBLE FOR REINVESTMENT INTO 13 OR 26 WK BILLS. NO 52-WK BILL WILL BE OFFERED ON THIS BILLS MATURITY DATE

DAVID L WINER
156 BROAD ST
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department X
Washington DC 20239

Phone (202) 287-4113
Phone (Dual - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book Entry Treasury Bills." All changes for this account must be received at the address above by

12/14/92

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

8, U. S. Treasury Bill

Discount 1,244.00

X (6).

OF THE PUBLIC DEBT

STATEMENT DATE:
06/22/82

BTO-2-029 30 2989-01

711-59158
36209150

ISSUE DATE	MATURITY DATE	CUSIP	SERIES	DENOMINATION	DISCOUNT
05/20/82	11/18/82	912794BTC	029-30-2989	30,000	1,843.30

TENDERED	ACCEPTED
0	30,000

THIS ACCOUNT IS ONLY ELIGIBLE FOR REINVESTMENT INTO 13 OR 26 WK BILLS. NO 52-WK BILL WILL BE OFFERED ON THIS BILLS MATURITY DATE

DAVID L WINER
156 LROAD ST.
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department E
Washington DC 20226

Phone (202) 287-4113
Phone (Deaf - TDD) (202) 287-4097

Please review the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, Request for Transactions in Book Entry Treasury Bills. All changes for this account must be received at the address above by

10/22/82

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

9. U. S. Treasury Bill

Discount 1,843. 30

X (7).

FORM PD 4949
DEPT. OF TREASURY
BUR. OF THE PUBLIC DEBT

STATEMENT OF ACCOUNT FOR TREASURY BILLS

THIS STATEMENT IS NOT NEGOTIABLE

STATEMENT DATE: 06/09/92

BU7-2-029 30 2986-01

011-59525

36604910

ISSUE DATE	MATURITY DATE			
05/27/82	11/26/82	9127998U7 029-30-2986	10.000	593.60

D	4	10.000

THIS ACCOUNT IS ONLY ELIGIBLE FOR REINVESTMENT INTO 13 OR 26 WK BILLS. NO 52-WK BILL WILL BE OFFERED ON THIS BILLS MATURITY DATE

DAVID L WINER
156 BROAD ST
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department X
Washington DC 20226

Phone: (202) 287-4113
Phone (Deaf - TDD): (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book-Entry Treasury Bills." All changes for this account must be received at the address above by

10/27/92

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

10. U. S. Treasury Bill

Discount 593.60

X (8).

FORM PD 4949
DEPT. OF TREASURY/
BUR. OF THE PUBLIC DEBT

STATEMENT OF ACCOUNT FOR TREASURY BILLS

THIS STATEMENT IS NOT NEGOTIABLE

STATEMENT DATE: 12/1/82

011-69529

ISSUE DATE	MATURITY DATE	PURCHASE PRICE	AMOUNT
07/01/82	12/30/82	912794BC7 03a-30-3a4a	10,000 678.40

0	10,000

THIS ACCOUNT IS ELIGIBLE FOR REINVESTMENT INTO 13,26 OR 52 WEEK BILLS

DAVID L WINER
154 BROAD ST
LYNN MA 01901

Department of the Treasury
Bureau of the Public Debt

Address:
Bureau of the Public Debt
Department X
Washington DC 20226

Phone (202) 287-4113
Phone (Dealer 1001: (202) 287-4097

Please enclose the duplicate copy of this statement with all correspondence or when submitting Form PD 4633, "Request for Transactions in Book-Entry Treasury Bills." All changes for this account must be mailed at the address above by:

12/01/82

Retain this statement for your tax records. If Treasury bills are held to maturity, the discount is considered interest income and must be reported for the tax year in which the bill matures.

11. U. S. Treasury Bill

Discount 678.40

X (9).

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

No. 92-20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BARBARA WINER,

Petitioner,

v.

LAURENCE H. WINER, LINDA R. WINER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF RESPONDENTS LAURENCE H. WINER and LINDA R. WINER IN OPPOSITION

LAURENCE H. WINER
ARIZONA STATE UNIVERSITY
College of Law
Armstrong Hall
Tempe, Arizona 85287-7906
(602) 965-5806

July 23, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

14

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court has federal question jurisdiction under 28 U.S.C. §1257 to review this matter involving issues solely of state law.

2. Whether the Massachusetts Appeals Court properly affirmed summary judgment dismissing Plaintiff-Petitioner Barbara Winer's claims because she failed to make the responsive showing required by Massachusetts law once Defendants-Respondents demonstrated they were entitled to such judgment since, under Massachusetts law, Petitioner cannot amend an express, irrevocable, recorded *inter vivos* trust created in 1965 by the parties' since-deceased father and terminated in 1986, to which she was a complete stranger, by now adding herself as a beneficiary.

3. Whether the Massachusetts Appeals Court properly affirmed summary judgment under state law in favor of Respondent Laurence H. Winer on his unanswered counterclaims for malicious prosecution and for abuse of process, based on uncontroverted facts set forth in uncontested affidavits and in light of insufficient appellate argument by Petitioner.

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No. 92-20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BARBARA WINER,

Petitioner,

v.

LAURENCE H. WINER, LINDA R. WINER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF RESPONDENTS LAURENCE H. WINER and LINDA R. WINER IN OPPOSITION

STATEMENT OF THE CASE

Through her somewhat incoherent *pro se* complaint in this action, Petitioner Barbara Winer ("Barbara") apparently seeks to amend an express, irrevocable, recorded *inter vivos* trust – the Linda Realty Trust ("Trust") – by adding herself as a beneficiary twenty-five years after the creation of the Trust in 1965, and three years after its termination in 1986. Respondents Laurence H. Winer ("Laurence") and Linda R. Winer

("Linda"), brother and sister of Barbara, were the co-trustees and beneficiaries of the Trust created by the parties' father who died in 1982. Laurence, a member of the Massachusetts Bar, also was named executor of his father's estate.

Barbara was not mentioned in the Trust; she was neither trustee nor beneficiary. Under Massachusetts law she never had any interest in or entitlement to the Trust whatsoever. Two successive, independent attorneys, whom Barbara retained but subsequently fired and tried to sue for malpractice and fraud (Pet. at 54-55), advised her that her claims at issue in this lawsuit are meritless. What she seeks is legally impossible under Massachusetts law; she has never advanced any legal authority or factual basis that supports her position.

Barbara's claims under the Trust are barred as a clear matter of Massachusetts law because the Trust was irrevocable and had not and could not have been amended, revoked or otherwise modified. For these reasons, the Massachusetts trial court properly awarded Laurence and Linda summary judgment on Barbara's claims, after patiently trying to explain to her in layman's terms why her position, based on nothing but her subjective belief, lacked any merit. She nonetheless stated she would appeal and continue to prosecute the baseless action. (*See* Pet. at 39).

Moreover, Barbara's *pro se* complaint in this action is only the most recent of a long series of senseless and frivolous legal actions designed solely to harass and annoy her brother Laurence. This is despite the fact that, in their sole discretion and without any legal obligation to do so, Laurence and Linda early on offered to treat Barbara entirely equally with themselves and

divide all Trust (and estate) net assets equally among all three. Inexplicably and contrary to her then attorney's advice (Pet. at 16), Barbara spurned all such offers which would have given her exactly what her own attorney requested and far more than she was legally entitled to. She fired her second attorney and proceeded *pro se*. Prior to this present action, a Massachusetts probate court judge found Barbara's objections to Laurence's administration of the estate to be entirely meritless. To the extent Barbara even now seeks to relitigate those claims in this action, they are barred by *res judicata*.

Unfortunately, Barbara is motivated solely by such an irrational animus against her brother that she has pursued to outrageous lengths a malicious campaign to frustrate Laurence's every attempt at proper administration of the Trust and the estate. This has included her filing dozens of meritless pleadings in both matters, and her attempts to disqualify each of three state trial judges she has appeared before based solely on their rulings against her. (*See* Pet. at 22, 32, 41). She apparently believes the entire Massachusetts judicial system has conspired against her. (Pet. at 64-65 n.15).

Finally unable and unwilling to bear any longer the substantial adverse financial and other effects of this campaign being waged against him, culminating in the present action, Laurence set forth counterclaims including ones for malicious prosecution and abuse of process under Massachusetts law. In her complaint, attachments and other documents she submitted to the courts, including the advice her previous attorneys had given her, Barbara herself produced incontestable documentary evidence of the frivolous, malicious, bad faith nature of her actions. This evidence was so clear and substantial and uncontroverted by Barbara that the trial court properly

found Laurence entitled as a matter of state law to summary judgment on his counterclaims. (Pet. at App. F., I.).

In short, no substantial question of law was presented by this bizarre appeal in the Massachusetts courts, and there certainly is no federal question giving the Supreme Court jurisdicton or warranting review by this Court. The Massachusetts Appeals Court most properly affirmed the award of summary judgment for Laurence and Linda on Barbara's claims since Laurence and Linda demonstrated they were entitled to such judgment and Barbara submitted no affidavit in opposition to summary judgment or otherwise set forth specific facts, as she could not do, showing there was a genuine triable issue. (Pet. at App. L. (5)-(8)). Similarly, Barbara never even answered Laurence's counterclaims for malicious prosecution and abuse of process, nor did she attempt to challenge the uncontroverted facts set forth in uncontested affidavits of Laurence and Linda submitted in support of their motion for summary judgment. She failed to demonstrate a genuine triable issue on the counterclaims as well. (Pet. at App. L. (11)). The Appeals Court also appropriately determined that the one-sentence paragraph in Barbara's brief addressing the counterclaims and simply alleging error in the most general and conclusive way constituted insufficient appellate argument. (Pet. at App. L. (9)-(11)).

On February 13, 1992, the Appeals Court therefore correctly affirmed summary judgment as to liability for Laurence on his counterclaims for malicious prosecution and abuse of process. (Pet. at App. L. (1)). The court, however, also determined that judgment for Laurence on a third, statutory counterclaim was not appropriate, and that the trial court's judgment was for one lump sum for

all three counterclaims. The Appeals Court therefore vacated the award of damages and remanded solely for a determination of damages on the two counterclaims upheld. (Pet. at App. L. (8)-(9), (11)-(13)). This has not yet occurred.

On March 24, 1992, the Massachusetts Appeals Court denied a petition for rehearing. (Pet. at App. M.). On March 30, 1992, the Supreme Judicial Court of Massachusetts, exercising its discretion under state law, denied further appellate review. (Pet. at App. A).[1]

SUMMARY OF ARGUMENT

The Supreme Court lacks jurisdiction because the claims in this case involve matters solely of state law. As the Massachusetts trial and appellate courts ruled, Barbara's claims are barred by clear principles of the Massachusetts law of trusts. Those courts also sustained Laurence's counterclaims under the Massachusetts law regarding claims for malicious prosecution and abuse of process. No state court addressed any federal issue. The mere allegation by a disappointed state litigant that she was denied due process because state courts ruled against her on the merits does not create a federal question. Since no federal question is even remotely implicated in this case, the Supreme Court lacks jurisdiction to review the matter.

Moreover, even if this Court somehow had jurisdiction, which it clearly does not, there certainly would be no

---

[1] Denial of further appellate review in Massachusetts is not a decision on the merits. *Ford v. Flaherty*, 364 Mass. 382, 387-88 (1973). Petitioner inappropriately has designated her Petition as one for a writ of certiorari to the Massachusetts Supreme Judicial Court instead of to the Massachusetts Appeals Court. *See Faretta v. California*, 422 U.S. 806, 812 (1975).

special or important reason warranting certiorari. There is no credible indication of any error by the state courts. This simple state court dispute over a small family trust involves only the immediate litigants and raises no matter affecting the public interest or the interests of justice. Such a matter is not appropriately subject to Supreme Court review, and the petition for certiorari should be denied.

ARGUMENT

I.

THE SUPREME COURT LACKS JURISDICTION TO REVIEW THIS MATTER INVOLVING ISSUES SOLELY OF STATE LAW.

Petitioner asserts jurisdiction in the Supreme Court pursuant to "28 U.S.C. §1257(3)" [sic]. (Pet. at 4). There is, however, no federal question even remotely implicated in this matter and the Court does not have jurisdiction.

Barbara's claims in this matter involve simply "black-letter" issues of the Massachusetts law of trusts which were so clear as to warrant summary judgment against her. Similarly, the counterclaims at issue involve only the law in Massachusetts as to that state's causes of action for malicious prosecution and abuse of process. Again, the law and uncontroverted facts warranted summary judgment for Laurence on his counterclaims. These matters purely of state law are not properly subject to review in the Supreme Court. *Webb v. Webb*, 451 U.S. 493, 494 n.1 (1981). The fact that neither state appellate court passed on any federal question strongly confirms the lack of any such issue here. *Webb*, 451 U.S. 495-96, *quoting Street v. New York*, 394 U.S. 576, 582 (1969). *See also Yee v. City of Escondido*, ___ U.S. ___ , 112 S.Ct. 1522, 1531 (1992) (Court would

not consider substantive due process claim not raised below and which state courts did not address).

In a transparent attempt to manufacture jurisdiction for the Court, Barbara alleges a deprivation of due process simply because state court judges had the temerity to rule against her on her meritless claims. This is all her invocation of due process amounts to. (Pet. at 31-32, 41-42, 47, 51, 53). Despite the plethora of process afforded her at all levels of the state court system, Barbara has never achieved any measure of success. For this she blames everyone but herself, refuses to see the frivolous nature of her claims, and attacks anyone who disagrees with her. She spurned the good advice of her two successive, independent attorneys (*see* Pet. at 16), and then tried to sue each of them for malpractice and fraud. (Pet. at 54-55). Then she voluntarily proceeded *pro se,* apparently believing she cannot trust any attorney. She moved to disqualify each state court trial judge she faced simply because of their rulings against her. (Pet. at 22, 32, 41). She tried without effect to initiate disciplinary proceedings against lawyers and judges, including her brother Laurence. (Pet. at 12, 65 n.15). She cast flagrant aspersions upon the Massachusetts Appeals Court, accusing it of "sanction[ing] . . . fraud" and issuing "an incomplete and evasive" opinion and order. (Pet. at 47-48). This supposedly demonstrates that court's "abrogation of her constitutional rights." (Pet. at 47). Similarly, she now asserts the Massachusetts Supreme Judicial Court denied her due process by "abus[ing] its governmental authority" and "sanction[ing] . . . fraud" in denying her petition for further appellate review. (Pet. at 53). Indeed, in a footnote to this passage Barbara reveals that she apparently believes the entire Massachusetts judicial system is conspiring

against her and that the Supreme Judicial Court "maliciously and unconscionably discriminated against [her] in order to cover up the gross abuses of the judicial system." (Pet. at 64-65 n.15). Nowhere, however, does she advance a single fact to support her wild accusations. Rather, she inappropriately asks this Court to "judicially notice" the rightness of her cause. (Pet. at 53).

None of this sad fantasy begins to create a federal question for Supreme Court jurisdiction. In essence, Barbara's argument, such as it is, would convert *every* disappointed state court litigant into a Supreme Court petitioner with a "due process" federal question for review. Such a litigant simply would argue that the state courts have ruled against her on matters of state law and therefore denied her due process. This is all Barbara's convoluted and fantastic claim here amounts to. The Court, however, long ago rejected any such notion of federal question jurisdiction, holding:

> It is elementary and needs no citation of authority to show that the due process clause of the 14th Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character.

McDonald v. Oregon Railroad & Navigation Co., 233 U.S. 665, 669-70 (1914). *See also Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 166 (1917) ("The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.")

There is no semblance of a federal question here. The Court therefore lacks jurisdiction and the Petition should be denied for that reason alone.

II.

THERE IS NO SPECIAL OR IMPORTANT REASON TO OCCASION REVIEW BY THIS COURT.

Even if a federal question somehow were present to sustain the Court's jurisdiction, which clearly is not the case, there are no "special and important reasons" for the Court to grant review. Sup. Ct. R. 10.1. There is no conflict between courts, and the Massachusetts courts did not decide *any* federal question let alone an important, unsettled such question that the Supreme Court should resolve. Sup. Ct. R. 10.1(c).

Petitioner is simply an unsuccessful and disappointed state court litigant in an unfortunate and totally unnecessary dispute over a small family trust. The Supreme Court does not "sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Certiorari is not granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Barbara has not demonstrated, and can not, that there is any matter here affecting the public interest or the interests of justice. The Supreme Judicial Court of Massachusetts found no reason for further appellate review of this matter, and there certainly is no basis for Supreme Court review.

Petitioner's underlying claim to amend the Trust is barred by "black-letter" Massachusetts law as the state trial court found in granting Respondents summary judgment. Similarly, the trial court had no difficulty in

awarding Laurence summary judgment on his counterclaims based on applicable Massachusetts law and the uncontested facts before that court. The Massachusetts Appeals Court carefully reviewed the entire record before it and found nothing that could be construed even liberally to support Barbara's position. (Pet. at App. L. (7)-(8)). As that court said, "[T]he rules bind a pro se litigant as they bind other litigants." (Pet. at App. L. (10), *quoting Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985)). The Appeals Court nevertheless interpreted a Massachusetts statute to bar one of Laurence's counterclaims thereby requiring a redetermination of damages, but otherwise affirmed the trial court on procedural and substantive grounds. Barbara received full, fair and impartial treatment by the Massachusetts courts. Nothing suggests otherwise, and there is no reason to grant certiorari.

CONCLUSION

Fot the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 23, 1992

Supreme Court, U.S.
FILED
AUG 18 1992
OFFICE OF THE CLERK

No. 92-20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1991

BARBARA R. WINER — PETITIONER

vs.

LAURENCE H. WINER and LINDA R. WINER — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF OF PETITIONER BARBARA R. WINER TO BRIEF OF RESPONDENTS LAURENCE H. WINER and LINDA R. WINER IN OPPOSITION

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QUESTION PRESENTED

1) DID THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DEFRAUD THE PETITIONER OF HER RIGHTFUL ONE-THIRD (1/3) SHARE OF THE INHERITANCE FROM HER FATHER'S TRUST AND ESTATE, THEREBY DENYING HER DUE PROCESS OF LAW, WHEN IT REFUSED TO GRANT HER PETITION FOR FURTHER APPELLATE REVIEW?

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ARGUMENT

I.

THE FORMAT OF THE RESPONDENTS' BRIEF IN OPPOSITION IS FAULTY

The Respondents served their Brief in Opposition ("OPP.") to the Petitioner without (1) signing their OPP. or indicating that such was signed, and (2) without indicating who is their counsel of record. Thereby, the Respondents submitted their OPP. in violation of Federal Rules of Civil Procedure rule 11, and Rules of the Supreme Court rule 33.6. (See OPP. signature page attached hereto as Appendix "App." a. Also, note lack of designation of counsel of record on OPP. cover, App. c; See App. d(1)-(2) and e(1).

Said violations prejudice the Petitioner because (1) since a typewritten name on pleadings is not a signature for Rule 11 purposes, no one is subject to responsibility should she wish to request Rule 11 sanctions against the Respondents (See Giebelhaus v. Spindrift Yachts, 938 F.2d 962, 965, 966 (C.A. 9th 1991)), and (2) because the Petitioner cannot determine if Respondent Laurence, who is an attorney, is representing only himself or if he is representing Respondent Linda as well.

The Respondents also submitted their OPP. in violation of Supreme Court Rules 29.5 (c) by failing to serve the Petitioner with a **notarized** Certificate of Service, or to indicate thereon who is counsel of record for each party. (See App. b(1)-(2) and e(2).)

For the foregoing reasons, pursuant to Rules of the Supreme Court rule 33.7, this Court should impose sanctions against the Respondents. (See App. e(1).)

II.

THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THE UNITED STATES SUPREME COURT LACKS JURISDICTION OVER THIS CASE

A. THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THIS CASE INVOLVES SOLELY MATTERS OF STATE LAW

The Respondents support Barbara's claim that she is an equal one-third (1/3) beneficiary of their father's Trust and estate by acknowledging that they,

> "...early on offered to treat Barbara entirely equally with themselves and divide all Trust (and estate) net assets equally among three."
> (See OPP. pp. 2, 3; See Petition for Writ of Certiorari ("PET.") p. 60, Note "n." 3.)

However, Barbara stated facts and provided **documentary evidence** which clearly prove that any such offer made by the Respondents was fraudulent, as such was designed to defraud her out of her rightful one-third (1/3) share of the inheritance. (See PET., especially pp. 10, 14-16, 22-25 & App. W(1)-X(9).)

Nowhere in their OPP. did the Respondents factually controvert even one fact or object to even one piece of evidence of their fraud.[1]

Instead, the Respondents evaded direct discussion of said issue:

With regard to the estate, the Respondents merely implied that just because a Massachusetts Probate Court Judge (Manzi) approved their estate administration that such was proper. (See OPP. p. 3.)

With regard to the Trust, the Respondents merely offered general allegations to the effect that Barbara's claims are

> "...barred by clear principles of the Massachusetts law of trusts."
> (See OPP. p. 5.)

However, the Respondents failed to state even one Massachusetts law or to cite even one Massachusetts case to support their claim, or to counter the plethora of legal authority cited by Barbara whereby she clearly established her interest as an equal one-third (1/3) beneficiary of their father's Trust and estate. (See PET. especially pp. 27, 43-44, 62 n. 12 - 64 n. 13. See also p. 61 n. 4.)

Moreover, nowhere in their OPP. did the Respondents controvert Barbara's argument that their Motion for Summary

Judgment on their counterclaims should not have been allowed because their Affidavits in support of such were improperly submitted, and thus are legally ineffective. (See PET. pp. 35-36.)

Here, as throughout the State Court proceedings, the Respondents have never factually challenged or legally disputed the merits of Barbara's case.

Nevertheless, in an action repugnant to the United States Constitution, the Supreme Judicial Court of Massachusetts let stand as a source of Massachusetts law the arbitrary, unconstitutional adjudication of the Appeals Court which sanctioned the Respondents' wrongful behavior and denied Barbara **DUE PROCESS OF LAW**. (See PET. pp. 47-51.) Thereby, the Supreme Judicial Court affirmed the

abrogation of Barbara's **fundamental right.**[2]

It is clear that this case involves **Federal** constitutional issues and principles. (See PET. Section III pp. 4-5).

Inapplicable then to this case are the following authorities cited by the Respondents to support their claim that this case is not subject to review by the Supreme Court because such involves only non-federal matters: Webb v. Webb, 451 U.S. 493, 494 n. 1 (1981); McDonald v. Oregon Railroad & Navigation Co., 233 U.S. 665, 669-70 (1914), and Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157, 166 (1917).

Furthermore, Enterprise (supra.) at 164 makes it clear that the Supreme Court has jurisdiction over this case: Therein, the Court stated that where a

non-Federal issues is so interwoven with the Federal issue so as not to be an independent matter, and in cases where arbitrary adjudications are rendered... **as in the case here**... the U.S. Supreme Court's jurisdiction is plain.

B. THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THE STATE COURTS FAILED TO PASS ON THE FEDERAL QUESTION HEREIN PRESENTED FOR REVIEW

The Petitioner raised the Federal Question that she was denied **DUE PROCESS OF LAW** immediately after her Federal Constitutional rights were first abrogated by a Superior Court Judge (Flannery).

She continued to raise said issue at every stage of the proceedings throughout the State Court system so that each Court had an opportunity to correct the violations of her Federal rights.

In so doing, the Petitioner made direct reference to the Court records and the United States Constitution, and presented the Federal question in such a manner that the issue of **DUE PROCESS OF LAW** was made an issue of her case. Thus, the Federal Question was implicitly involved in each Court's adjudication(s).

Nowhere in their OPP. did the Respondents dispute even one fact whereby the Petitioner evidenced that she preserved her Federal claim for review by this Court.

Instead, noting that the State Courts failed to address the Federal Question, the Respondents implied that this was for want of presentation by citing authority whereby they claimed that (this)

> "Court would not consider substantive due process claim not raised below and which state courts did not address." (See OPP. pp. 6, 7.)

In the authorities cited by the Respondents, Webb (supra.) at 495, and Street v. New York, 394 U.S. 576, 582 (1969), the Court stated when,

> "...the highest state court has failed to pass upon a federal question it will be assumed that the omission was due to want of proper presentation in the state courts, **unless the aggrieved party in this Court can affirmatively show the contrary.**" (Emphasis)

It is clear that the Petitioner rebutted the assumption of want of proper presentation by proving, with undisputed facts, that she timely, properly and explicitly raised her Federal constitutional issue in the trial court, and in two appellate courts. (See PET.

pp. 31-33; 41-42; 47-48; 51; and p. 64 n. 14.)

This likens her case to Street (supra.) at 581-585 over which the Supreme Court assumed jurisdiction after deciding that the Appellant raised his Federal constitutional issue in the trial court, and in two appellate courts.[3]

III.

THE RESPONDENTS WERE IN ERROR IN CLAIMING THAT THIS CASE DOES NOT CONCERN MATTERS AFFECTING THE INTERESTS OF JUSTICE OR THE INTERESTS OF THE GENERAL PUBLIC

Rules of the Supreme Court rule 10.1 provides in part,

> "A petition for a writ of certiorari **will** be granted only when there are special and important reasons therefor." (Emphasis) (See PET. p. 57-58 and Supreme Court Rule 10.1 (c), App e(3).)

Special and important reasons imply that the settlement of a case involves

constitutional issues and principles of importance to the public. (See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955) and Layne v. Bowler Corp. v. Western Well Works, Inc. 261 U.S. 387, 393 (1923).)

Any reasonable, unbiased person familiar with the facts of this case would undoubtedly recognize that the Supreme Judicial Court of Massachusetts flagrantly violated the United States Constitution when, **for no legitimate state compelling reason**, it invidiously discriminated against the Petitioner and sanctioned the fraud of the Respondents and other "Officers of the Court" toward her in the inheritance from her father's Trust and estate.

Thus, this case is of **fundamental** importance to **all** Americans because it concerns the **fundamental** issue of **the**

protection of the individual against arbitrary action of government.

The facts of this case clearly demonstrate:

1) This case concerns the Federal claim that the Petitioner was denied **DUE PROCESS OF LAW**;

2) The Petitioner timely and properly preserved her Federal claim for review by this court;

3) The merits of the Petitioner's claim have never been factually or legally controverted; and

4) This case is of **fundamental** importance to <u>all</u> Americans.

It is clear that this case is within the jurisdiction of the United States Supreme Court.

CONCLUSION

Wherefore, in the interests of justice to both the Petitioner and the general public, the United States Supreme Court must exercise its judicial discretion to grant the Petition for (a) Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

THE PETITIONER IN PRO SE

Barbara R. Winer

Barbara R. Winer
P.O. Box 122
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(818) 377-3245 August 15, 1992

ENDNOTES

[1]When a prima facie case of liability has been shown against a Defendant, the Defendant has the burden of introducing evidence to rebut it. His failure to present evidence within his control to deny facts adverse to his interest warrants the inference that those facts are true and may be found to be an admission by silence. (See Tardie v. Condon, 22 Mass. App. Dec. 202-204, 205, (1961) and Giannusa v. First National Stores, Inc., 55 Mass. App. Dec. 108, 109, 113 (1974).)

[2]Citing Ford v. Flaherty, 364 Mass. 382, 387-88 (1973) the Respondents claim "Denial of further appellate review in Massachusetts is not a decision on the merits." (See OPP. p. 5 n. 1.)

The Petitioner maintains that the circumstances of her case render the Court's denial of her Petition for such review an affirmation of the adjudication by the Appeals Court on the legal and constitutional issues involved.

In the same footnote, the Respondents state that the Petitioner should have designated her PET. to the Massachusetts Appeals Court. They also stated, "See Faretta v. California 422 U.S. 806, 812 (1975)."

The Petitioner references Supreme Court Rule 10.1(b) to dispute this claim. (See App. e(3).)

The Petitioner also states that Faretta at 806, 812 is not relevant here.

[3]The Respondents' cited authority Yee v. City of Escondido, 112 S.Ct. 1522, 1531 (1992) is unlike this case because the Yees had not raised the due process part of their claim in the state courts. Thus, after granting certiorari to the Yees, the Supreme Court would not consider said part of their claim.

awarding Laurence summary judgment on his counterclaims based on applicable Massachusetts law and the uncontested facts before that court. The Massachusetts Appeals Court carefully reviewed the entire record before it and found nothing that could be construed even liberally to support Barbara's position. (Pet. at App. L. (7)-(8)). As that court said, "[T]he rules bind a pro se litigant as they bind other litigants." (Pet. at App. L. (10), *quoting Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985)). The Appeals Court nevertheless interpreted a Massachusetts statute to bar one of Laurence's counterclaims thereby requiring a redetermination of damages, but otherwise affirmed the trial court on procedural and substantive grounds. Barbara received full, fair and impartial treatment by the Massachusetts courts. Nothing suggests otherwise, and there is no reason to grant certiorari.

CONCLUSION

Fot the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 23, 1992

BEST AVAILABLE COPY

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

BARBARA R. WINER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 92-20
	)	
LAURENCE H. WINER,	)	
LINDA R. WINER,	)	
	)	
Respondents.	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

This is to certify that today, July 23, 1992, I delivered (mailed), in quantities itemized, copies of the Brief Of Respondents Laurence H. Winer and Linda R. Winer In Opposition (1 volume) in the above-entitled matter to the following counsel of record:

(file 40 copies)
(FILED BY HAND DELIVERY)

b(1)

3 copies to:
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Remaining copies to:
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By: Roger Thiel

Subscribed to and sworn before me this _____ day of _____, 19_____
_____ Notary Public.
My commission expires: _____

NOTE: THIS WAS NOT NOTARIZED.

b(2)

No. 92-20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BARBARA WINER,

Petitioner,

v.

LAURENCE H. WINER, LINDA R. WINER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF RESPONDENTS LAURENCE H. WINER and LINDA R. WINER IN OPPOSITION

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July 23, 1992

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C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions and Other Papers, Sanctions provides in pertinent part:

Every pleading, motion, an other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessarily delay or needless increase in the cost of litigation. **If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly**

after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis)

RULES OF THE SUPREME COURT

Rule 33

PRINTING REQUIREMENTS

Rule 33.6 provides in pertinent part:

> The body of every document at its close **shall bear the name of counsel of record** and such other counsel, identified on the cover of the document... One copy of every motion or application... must in addition **be signed by counsel of record at the end thereof.** (Emphasis)

Rule 33.7 provides in pertinent part:

> ...If the Court finds that the provisions of this rule have not been adhered to, **it may impose, in its discretion, appropriate sanctions** including but not limited to dismissal of the action, imposition of costs, or disciplinary sanctions upon counsel.

Rule 29

FILING AND SERVICE OF DOCUMENTS SPECIAL NOTIFICATIONS

Rule 29.5 provides in pertinent part:

Proof of service, when required by these Rules, must accompany the document when it is presented to the Clerk for filing and must be separate from it. Proof of service may be shown by any one of the methods set forth below, and must contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of **counsel indicating the name of the party or parties each counsel represents...**

(c) By a **notarized** affidavit or declaration in compliance with 28 U.S.C. S 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, **whenever service is made by any person not a member of the Bar of this Court**. (Emphasis)

Rule 10

CONSIDERATION GOVERNING REVIEW ON WRIT OF CERTIORARI

Rule 10.1(b) and (c) provide in pertinent part:

1. A review on writ of certiorari is not a matter of right, but a judicial discretion. **A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.** The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(b) When a **state court of last resort** has decided a federal question in such a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, **or has decided a federal question in a way that conflicts with applicable decisions of this Court.** (Emphasis)